UNITED STATES
CUSTOMS COURT REPORTS

VOLUME 85

CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

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NOTICE

The President approved and signed Public Law 96–417, the Customs Courts Act of 1980, on October 10, 1980. The act, which became effective on November 1, 1980, clarified and expanded the status, jurisdiction, and powers of the United States Customs Court and changed the name of the court to the United States Court of International Trade.

The United States Customs Court Reports terminate with this volume. Volume 1 of the United States Court of International Trade Reports will begin with the first opinion published after November 1, 1980.

UNITED STATES CUSTOMS COURT

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EDWARD D. RE

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MORGAN FORD
SCOVEL RICHARDSON
FREDERICK LANDIS
JAMES L. WATSON
HERBERT N. MALETZ
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Reporter of Decisions

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Customs

(C.D. 4861)

BEN R. HENDRIX TRADING CO., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Memorandum Opinion and Order Granting Defendant's Motion to Dismiss

Court No. 79-6-01042

BOE, Judge: In the proceedings presently before this court, the defendant moves to dismiss the complaint and amended complaint of the plaintiff filed herein on the grounds that (1) the court lacks jurisdiction of the subject matter of the action, and (2) the allegations of the complaint and the relief sought therein fail to state a claim upon which relief may be granted.

From an examination of the plaintiff's complaint and amended complaint, the plaintiff appears to seek relief through a variety of imprecise and ambiguous designations. In sum, however, it appears that the plaintiff requests that this court assume jurisdiction of the above-entitled action in order to (1) grant to the plaintiff an award in the amount of $30,000,000 for damages and costs resulting from the alleged negligent and wrongful acts on the part of U.S. Customs officials and, in particular, the District Director of Customs at Laredo, Tex., and (2) issue what is termed in the within pleadings an "administrative ruling" with respect to the validity of the seizure of merchandise imported by the plaintiff, not entered and while in the joint custody under bond of the Customs Service and the warehouse proprietor, by a creditor through judicial process in a State court.

The protest upon which the summons and complaint in the within action are predicated was denied by the Customs Service on December 28, 1978, for the reason that it was untimely filed. In view of the insufficiency of the facts alleged with respect thereto, and particularly with respect to the paucity of facts as to the allegation that the Customs Service refused to accept prior protests of the plaintiff for filing in April of

1973, this court would deem it inappropriate to rule on the question of the timeliness in the filing of the protest herein in the absence of an evidentiary hearing with respect thereto. From the complaint and the amended complaint on file herein, however, it is patent that the aforesaid pleadings affirmatively disclose that this court does not have jurisdiction over the subject matter of the within action, and that the allegations therein fail to state a claim upon which relief may be granted.

The relief sought by the plaintiff relating to an award of pecuniary damages sounds in tort. It is axiomatic that the limited jurisdiction of the Customs Court is prescribed solely by the provisions of 28 U.S.C. § 1582. The jurisdiction of this court does not include actions in personam resulting from alleged negligent or wrongful acts of Government officials or agents. As provided in 28 U.S.C. § 1346, such actions are reserved to the exclusive jurisdiction of the U.S. district courts and/or the U.S. Court of Claims.

From the allegations in plaintiff's complaint and amended complaint as well as from the reported decisions of the Federal courts in which the plaintiff has instituted prior proceedings, it appears that after the sequestration ordered by the State court of the merchandise imported by the plaintiff and located in plaintiff's own warehouse under customs bond, plaintiff sought a declaratory judgment in the U.S. District Court, Southern District of Texas, Brownsville Division, seeking to have the attempted seizure of the subject merchandise by virtue of the order of the State court declared void.[1] The U.S. district court in said proceedings determined in its declaratory judgment that the State court properly could adjudicate the rights with respect to the subject merchandise. It may be noted that in said proceedings, George P. Schultz, as the Secretary of the Treasury of the United States, and the Customs officials of the U.S. Government were made party defendants.

With only scant reference to the foregoing proceedings in the U.S. district court in its complaint and amended complaint, the plaintiff now turns to this court in the attempt to secure what has been strangely termed in plaintiff's pleadings as an administrative ruling with respect to the validity of the judicial proceedings conducted in State court relating to the imported merchandise presumably under bond and in the joint custody of the Customs Service and the warehouse proprietor (the plaintiff).

From the pleadings, however, no indication is contained therein with respect to the present status of the merchandise in question. It is only through the further examination of court decisions relating

[1] *J. Henry Schroeder Banking Corporation* v. *George P. Schultz, Secretary of the Treasury of the United States; Ben R. Hendrix Trading Co., Inc.* v. *J. Henry Schroeder Banking Corporation*, 373 Fed. Supp. 1283 (S.D. Texas 1974).

to the very matters here in issue that this court is apprised of the true nature of the alleged controversy to which our attention has been directed and relief sought.

It appears that after entry of the declaratory judgment of the U.S. district court an appeal was instituted by the plaintiff in the U.S. Circuit Court of Appeals, Fifth Circuit, in which appeal proceedings the plaintiff, plaintiff's creditor and various customs officials were before the court.[2] From the opinion of Chief Judge Brown on behalf of the circuit court of appeals, it is revealed that after the institution of the appeal, the plaintiff filed a chapter XI reorganization proceeding in bankruptcy. During the course of the chapter XI proceedings all parties moved to sell the merchandise, which sale was conducted under the jurisdiction of the Bankruptcy Court and the merchandise in question delivered to the buyers. In determining that the appeal cause had become moot due to the admittedly valid sale of the merchandise in question by the Bankruptcy Court in a proceeding voluntarily initiated by the plaintiff, Chief Judge Brown stated:

> Both Customs officials and Hendrix recognized that the Bankruptcy Court had power to order such a sale. Indeed, as debtor, Hendrix had enough power and control over the goods to surrender them to the Bankruptcy Court. Thereafter the goods were not subject to any restraint by State officials and were subject only to payment or security for Customs' duties. Hendrix owns no other merchandise or liquor under Customs' bond and is no longer actively involved in importing and exporting bonded merchandise.
>
> The controversy that gave rise to the actions for declaratory judgments by both Hendrix and Schroeder was whether control of the liquor would be with Hendrix or with the State court officers and those who purchased it at the aborted judicial sales. Since the liquor has now been sold in an admittedly valid manner and is in the hands of third parties, none of the parties to the controversy below can be said to have any right of control over the goods. Thus, there is no longer any case or controversy. Hendrix owns no other merchandise in bond and is no longer in the business of importing and exporting bonded merchandise, so there is no likelihood that a similar controversy might arise in the future. (Id. at 1194–95.)

From the record in the within proceedings before this court as well as from the prior proceedings initiated by the plaintiff with reference to the very issue herein presented, it appears that relief presently is sought by the plaintiff in this court with respect to a subject matter consisting of merchandise which has been disposed of through sale and which no longer exists in any form or entity over which this court might exercise its jurisdiction. It is clear, therefore, that the

[2] *J. Henry Schroeder Banking Corp. v. W. Michael Blumenthal, Secretary of the Treasury of the United States; Ben R. Hendrix Trading Co. v. J. Henry Schroeder Banking Corp.*, 560 F.2d 1192 (5th Cir. 1977).

question presented to this court relating to the validity of the exercise of the judicial process of a State court upon the merchandise imported by the plaintiff while in the joint custody of the Customs Service and the warehouse proprietor is thus moot. In the case of *Mills* v. *Green*, 159 U.S. 651, 653 (1895), the Supreme Court stated:

> The duty of this Court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which can not affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence.

Further, in the case of *California* v. *San Pablo & Tulare Railroad Co.*, 149 U.S. 308, 314 (1893), the Supreme Court stated:

> The duty of this Court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the Government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power, or affect the duty, of the Court in this regard.

In the instant proceedings, we are faced with the fact that the imported merchandise of the plaintiff, which was the subject matter of prior litigation in the Federal courts, has been sold with the consent of the plaintiff during the course of the bankruptcy proceedings. Certainly, no effectual relief now can be granted by this court with respect to such nonexistent merchandise, which at one point in time, may have formed the subject matter over which jurisdiction of this court might have existed.

Notwithstanding by whatever name it may be allegedly termed, the relief sought by the plaintiff in its request for an administrative ruling, in essence, is merely a request for an advisory opinion by this court, presumably for such use in pending bankruptcy proceedings as might prove of benefit in connection with the ultimate distribution of proceeds therein.[3] The lack of power of this court or of any Federal court

[3] *See* Facts Of The Case at 9-10, attached to plaintiff's complaint.

to issue such advisory opinions needs no further comment or explanation. *Oil Workers Unions* v. *Missouri*, 361 U.S. 363, 367 (1960); *United States* v. *Alaska SS Co.*, 253 U.S. 113, 116 (1920); and *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971).

In view of the foregoing and good cause appearing, it is hereby

ORDERED that the motion of the defendant is, accordingly, granted and the above-entitled action be and is hereby dismissed.

Dated at New York, N.Y., this first day of July, 1980.

(C.D. 4862)

INTERNATIONAL SPRING MFG. CO., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

LEAF SPRINGS

Leaf springs which are suitable for use on various kinds of non self-propelled trailers held to be properly classified by Customs under item 652.88 as other springs rather than under item 652.84 as springs suitable for motor vehicle suspension, as claimed by plaintiff.

Court No. 74-9-02617

[Judgment for defendant.]

(Decided July 2, 1980)

Doherty and Melahn (*William E. Melahn* at the trial; *Walter E. Doherty, Jr.* and *Peter T. Middleton* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Robert H. White* at the trial and on the brief), for the defendant.

MALETZ, Judge: The problem in this case is to determine the proper tariff classification of leaf springs of base metal which were imported from Canada in 1973 and 1974. Customs classified the articles under item 652.88 of the Tariff Schedules of the United States (TSUS) which provides for other springs and leaves for springs, of base metal, and assessed duty at the rate of 9.5 percent ad valorem. Plaintiff claims the articles are properly classifiable under item 652.84 which provides for springs and leaves for springs, of base metal, suitable for motor vehicle suspension and prescribes a duty rate of 4 percent ad valorem

In this setting, the only issue is whether the imported springs are suitable for motor vehicle suspension. And resolution of this issue depends on whether the non-self-propelled trailers for which the importations are suitable are motor vehicles within the meaning of item 652.84.

The relevant provisions of TSUS read as follows:

Schedule 6, Part 3, Subpart F.—Miscellaneous Metal Products

	Springs and leaves for springs, of base metal:	
[Claimed]		
652.84	Suitable for motor vehicle suspension	4% ad val.
*	* * * * * * *	
[Classified]		
652.88	Other	9.5% ad val.

Also relevant to plaintiff's claim are the following provisions of TSUS:

Schedule 6, Part 6, Subpart B.—Motor Vehicles

*	* * * * * * *	
	Subpart B headnotes:	
	1. For the purposes of this subpart—	
*	* * * * * * *	
	(b) automobile truck tractors imported with their trailers are, together with their trailers, classifiable in item 692.02, but, if such tractors or trailers are separately imported, they are classifiable in item 692.27.	
*	* * * * * * *	
	Motor vehicles (except motorcycles) for the transport of persons or articles:	
	Automobile trucks valued at $1,000 or more, and motor buses:	
692.02	Automobile trucks	8.5% ad val.
*	* * * * * * *	
	Chassis, bodies (including cabs), and parts of the foregoing motor vehicles:	
*	* * * * * * *	
692.27	Other	4% ad val.
*	* * * * * * *	
692.60	Vehicles (including trailers), not self-propelled, not specially provided for, and parts thereof	8% ad val.
	General headnotes and rules of interpretation:	
	10. *General interpretative rules.*—For the purposes of these schedules—	
*	* * * * * * *	
	(b) the titles of the various schedules, parts, and subparts and the footnotes therein are intended for convenience in reference only and have no legal or interpretative significance;	

The importations consist of four types of leaf springs which are suitable for and used in various kinds of non-self-propelled trailers such as utility trailers for carrying air compressors, generating units,

etc.; boat trailers, horse trailers, and mobile homes. The springs are not used in self-propelled vehicles nor is there any evidence that they are suitable for such use.[1]

Against this background, it must be concluded for the reasons that follow that the non-self-propelled trailers for which the imported springs are suitable are not motor vehicles within the meaning of item 652.84, as claimed by plaintiff. In this circumstance, the court holds that the springs in question were correctly classified by Customs under item 652.88 as other springs and leaves for springs, of base metal.

As stated before, resolution of the instant controversy turns on whether the term "motor vehicle" as used in item 652.84 is limited to self-propelled vehicles or whether, as plaintiff claims, the term includes non-self-propelled vehicles such as the trailers here involved. And in construing that term, it is basic that in the absence of a contrary legislative intent, the common meaning controls. It is to be added that the common meaning of a term is a matter of law to be determined by the court, for which purpose the court may consult dictionaries and other authorities as an aid to the court's own knowledge. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, 102, C.A.D. 1088, 471 F.2d 1397, 1398 (1973).

Funk & Wagnalls New Standard Dictionary of the English Language (Unabridged, 1956) defines "motor vehicle" as:

> n. Any form of self-propelling vehicle.

Webster's Third New International Dictionary of the English Language (Unabridged, 1963) defines "motor vehicle" as:

> n. an automotive vehicle not operated on rails; *esp.* one with rubber tires or for use on highways.

The same source defines "automotive" (vehicle) as:

> 2: of, relating to, or concerned with vehicles or machines that propel themselves (as automobiles, trucks, planes, motor boats).

The Harper Encyclopedia of Science, volume III (1st ed. 1963) defines "motor vehicles" as follows (p. 806):

> Motor vehicle: A self-propelled conveyance used for passenger transportation (automobiles, buses, motorcycles) or for hauling freight (trucks). * * *

A similar definition appears in the McGraw-Hill Dictionary of Scientific and Technical Terms (1974), which restricts motor vehicles to self-propelled devices.

Plaintiff, though, points out that the National Traffic and Motor Vehicle Safety Act of 1966 defines a "motor vehicle" as "any vehicle driven or drawn by mechanical power manufactured primarily for use on the public streets, roads and highways, except any vehicle operated

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[1] Suitability for use in terms of TSUS means that the article in question must be actually, practically, and commercially fit for the intended use. E.g., *United States* v. *Norman G. Jensen, Inc.*, 64 CCPA 51, 53, C.A.D. 1183, 550 F.2d 662, 664 (1977); Sturm, *Customs Law and Administration* (1980), § 53.3, p. 501.

exclusively on a rail or rails." 15 U.S.C. § 1391(3).[2] Based on the definition contained in that and other nontariff statutes, plaintiff argues that the term "motor vehicle" includes any non-self-propelled vehicle that is used on public highways. However, it is settled that the definition of a term contained in a statute or regulation dealing with nontariff matters, such as public safety, does not determine the common meaning of that term for tariff purposes. *Pharmacia Laboratories, Inc.* v. *United States*, 67 CCPA—, C.A.D. 1235, 609 F. 2d 491, 493 (1979); *United States* v. *Mercantil Distribuidora et al.*, 43 CCPA 111, 116, C.A.D. 617 (1956); *Marine Products Co.* v. *United States*, 42 Cust. Ct. 154, 155, C.D. 2080 (1959).

Furthermore, it is apparent from item 692.60, supra, which covers "Vehicles (including trailers), not self-propelled, not specially provided for, and parts thereof," that Congress intended that various types of non-self-propelled trailers are to be classified as vehicles and not as motor vehicles.[3]

Plaintiff next argues that headnote 1(b), schedule 6, part 6, subpart B, supra, evidences an intent by Congress to classify non-self-propelled vehicles, such as the trailers here involved, as motor vehicles for the purpose of TSUS. That headnote (quoted before) provides:

> 1. For the purposes of this subpart—
>
> * * * * * * *
>
> (b) automobile truck tractors imported with their trailers are, together with their trailers, classifiable in item 692.02, but, if such tractors or trailers are separately imported, they are classifiable in item 692.27.

As previously indicated, item 692.02 covers "Motor vehicles (except motorcycles) for the transport of persons or articles: * * * Automobile trucks," while item 692.27 covers "Chassis, bodies (including cabs), and parts of the foregoing motor vehicles: * * * Other." From this, plaintiff contends that even if the trailers here involved are imported separately and apart from their tractors, they are still considered by headnote 1(b) to be "parts of the foregoing motor vehicles," and as such classifiable under item 692.27 as other parts of motor vehicles.

Headnote 1(b), as the parties agree, incorporates the decision of this court in *Border Brokerage Company* v. *United States*, 42 Cust. Ct. 343, Abs. 62955 (1959). See P.R.D. 74–10, 8 Cust. Bull. 603, 604 (1974). In *Border Brokerage*, semitrailers, each of which was capable of carrying four automobiles, were held to be properly classifiable under

[2] Plaintiff's witnesses relied on this definition of "motor vehicle" contained in the Safety Act of 1966 for their conclusion that the term "motor vehicle" included any vehicle which was drawn by another vehicle on the highways or roads.

[3] The fact that item 692.60 is contained in schedule 6, part 6, subpart B, which is entitled "Motor Vehicles," is of no consequence. This is because general interpretative rule 10(b), supra, provides that "the titles of the various schedules, parts, and subparts * * * are intended for convenience in reference only and have no legal or interpretative significance."

paragraph 369(c) of the Tariff Act of 1930 as parts of automobile trucks. In use, the semitrailer was affixed to a gasoline-powered tractor by means of a "fifth wheel" or "kingpin." Once attached, the trailer and tractor were generally kept together to maintain identity of licensing, and for the reason that the runways or jump skids, running from the truck to the trailer, had to be a proper length to reach from the front upper deck of the trailer to the carrying rack above the cab of the truck. However, they could be separated and used with other cabs designed to pull such trailers. Further, the engine was housed in a tractor capable of being joined to the trailer and carrying a portion of the load.

Pursuant to safety regulations of the Interstate Commerce Commission, the trailers were equipped with airbrakes so that if the kingpin assembly failed, and the trailer broke loose, the brakes would lock and bring the trailer to a standstill. Air lines for the brakes, and electric lines for the various signal lights, were respectively hose and wire connections which ran from the tractor to the trailer. They were so integrated that they operated as and when the driver of the cab applied the brake or foot pedal.

Based on these facts, the court concluded that the trailers in question were parts of automobile trucks for the reasons that the trailers were dedicated to a specific use in conjunction with the motor cabs and the record established that the joining of a trailer to the cab created a single integrated unit with a common braking system and a common electric system operated simultaneously by the driver of the cab.

With these considerations in mind, it is apparent that not all non-self-propelled trailers are included within headnote 1(b). Indeed, the language of that headnote specifically refers only to automobile truck tractors imported with their trailers and states that if such trailers are imported separately they are classifiable under item 692.27 as other parts of motor vehicles. Particularly against the background of *Border Brokerage*, it seems evident that the headnote is directed to separately imported trailers which function in such manner as to create single, integrated automobile truck tractors when joined and hence are to be considered parts of motor vehicles for the purpose of TSUS. In the present case, by contrast, plaintiff has presented no evidence whatever that the involved trailers function as a single integrated unit when connected to the truck tractors, let alone any other evidence to establish that the trailers constitute parts of automobile truck tractors.

In the last analysis, plaintiff's position in effect is that all non-self-propelled trailers are motor vehicles under TSUS irrespective of whether or not they function as a single integrated unit when connected

to the truck tractors. But such a position is at odds not only with the common meaning of motor vehicle but also with headnote 1(b). What is more, such an interpretation would render nugatory the words "including trailers" in item 692.60, which item (as previously indicated) covers "Vehicles (*including trailers*), not self-propelled, * * *." [Italic added.]

To support its position that all non-self-propelled trailers are motor vehicles under TSUS, plaintiff relies on the following abstract of a Bureau of Customs letter dated October 7, 1968 (T.D. 68–284(16), 2 Cust. Bull. 631):

> Leaf springs measuring 26 inches in length from eye to eye which are used in the suspension systems of highway trailers, mobile homes, and in vehicles used in guided tours, movie studios, and other off-the-highway areas classifiable under the provision for springs and leaves for springs, of base metal: Suitable for motor vehicle suspension in item 652.84, TSUS.

Assuming that this Bureau letter may be construed as covering all trailers, it is in error. And of course it is in no way binding on the court. *Ditbro Pearl Co., Inc.* v. *United States*, 62 CCPA 95, C.A.D. 1152, 515 F. 2d 1157 (1975); *The Ferriswheel* v. *United States*, 84 Cust. Ct. 61, 69, C.D. 4844 (1980)

For the foregoing reasons, the classification of the importations by Customs under item 652.88 is affirmed and the action is dismissed.

(C.D. 4863)

ASG INDUSTRIES, INC., PPG INDUSTRIES, INC., LIBBEY-OWENS-FORD COMPANY, AND C E GLASS, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

On Plaintiffs' Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 76-3-00668

[Plaintiffs' motion granted; defendant's cross-motion denied.]

(Dated July 17, 1980)

Eugene L. Stewart and *Frederick L. Ikenson* for the plaintiffs.

Alice Daniel, Assistant Attorney General (*David M. Cohen*, Branch Director; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation; *John J. Mahon* and *Sidney N. Weiss* on the briefs), for the defendant.

FORD, Judge: This action, instituted by domestic manufacturers and wholesalers of float glass, presents the issue of whether countervailing duties should be assessed on importations of float glass pro-

duced in Belgium. The Secretary of the Treasury (Secretary) has determined that no bounty or grant was paid or bestowed, within the meaning of section 303(a) of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974, 88 Stat. 1978, 2049.

The parties have filed cross-motions for summary judgment, pursuant to rules 4.12 and 8.2 of the rules of this court.

Plaintiffs contend that various regional development programs administered by the Belgian Government, which include low-interest loans, investment subsidies in the form of cash grants, special accelerated depreciation rates at twice the normal rate, and exemptions from real estate taxes for a maximum period of 5 years, constitute bounties or grants being paid or bestowed upon the manufacture or production of float glass in Belgium.

Defendant's position is that the alleged bounties or grants do not possess the requisite effect upon international trade which would require imposition of countervailing duties.

The essential facts relating to the assistance given the two float glass manufacturers in Belgium are not in dispute, nor is the chronology leading to the final determination of the Secretary in finding that such assistance did not amount to a bounty or grant within the meaning of section 303(a), as amended, supra.

The statement of material facts, filed by the parties, establish that Boussois-Souchan-Neuvesel (BSN) and Glaceries de Saint-Roch (GSR) are the two manufacturers of float glass in Belgium. On June 3, 1974, plaintiffs filed a written petition with the Commissioner of Customs alleging bounties or grants were being paid or bestowed, directly or indirectly, upon the manufacture or production of float glass for export to the United States. A "Notice of Receipt of Countervailing Duty Petitions" was published in the Federal Register on January 15, 1975. As a result of the petition, an administrative investigation was conducted by the Department of Treasury, with the assistance of the U.S. Customs Service, pursuant to 19 U.S.C. 1303 and 19 CFR 159.47(c) (1975), in order to make preliminary and final determinations.

On July 3, 1975 a "Notice of Preliminary Countervailing Duty Determination" was published in the Federal Register, 40 F.R. 28104, which states in part as follows:

> On the basis of an investigation conducted pursuant to section 159.47(c) Customs Regulations (19 CFR 159.47(c)), it has been tentatively determined that benefits have been received under various regional development programs maintained by the Belgian Government. Assistance available in development areas includes interest rebates on loans or payment of equivalent amounts where investor capital is utilized, employment premiums, reduced rate of capital gains tax, tax exemptions for interest rate

subsidies and capital grants on investments, exemption from registration fees levied on increases in assets, exemption from real estate taxes, advanced depreciation and exemption from local taxes.

Benefits derived from programs such as those which are the subject of this investigation can, in some circumstances, constitute bounties or grants within the meaning of the law. Since the information thus far made available concerning these programs has not been sufficient to permit a thorough analysis of their nature and effect, it has been determined preliminarily that imports of float glass from Belgium benefit from the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930, as amended, by reason of the incentive programs mentioned above.

Before a final determination is made, consideration will be given to any relevant data, views, or arguments submitted in writing with respect to this preliminary determination. Submissions should be addressed to the Commissioner of Customs, 1301 Constitution Avenue NW., Washington, D.C. 20229, in time to be received by his office on or before August 4, 1975.

On August 15, 1975, an "Amendment to Notices of Preliminary Countervailing Duty Determinations" was published in the Federal Register, 40 F.R. 34423, which extended to September 3, 1975, the time within which submissions with respect to the preliminary determination would be accepted.

A "Notice of Final Countervailing Duty Determination" was published in the Federal Register, 41 F.R. 1299, on January 7, 1976, which set forth the following reasons for the determination:

Information has now been received that permits a more complete analysis of the alleged bounties and grants. Under various regional development programs administered by the Government of Belgium, low-interest loans, investment subsidies in the form of cash grants, special accelerated depreciation rates and exemption from real estate taxes have been given to producers of float glass. The Belgian Government has advised the Treasury Department that these benefits have the effect of offsetting disadvantages which would discourage industry from moving to and expanding in less prosperous regions. Inasmuch as the recipient glass producers sell a preponderance of their production in the European Community (not less than 85 percent), the level of exports to the United States is a small percentage of the amount exported, and the amount of assistance provided by the regional incentive programs is less than 2 percent of the value of float glass produced, these benefits are not regarded as bounties or grants within the meaning of section 303 of the act. All other benefits alleged in the petition are found either not to be bounties or grants or not to be applicable to the producers of float glass in Belgium.

Accordingly, for the reasons stated above, it is hereby determined that no bounty or grant is being paid or bestowed, directly

or indirectly, within the meaning of section 303 of the act, upon the manufacture, production, or exportation of float glass from Belgium.

On January 28, 1976, plaintiffs served a notice upon the Secretary, pursuant to 19 U.S.C. 1516(d), advising of plaintiffs' desire to contest the negative determination before the Customs Court and requesting that publication of the notice be made forthwith as required by 19 U.S.C. 1516(d).

On March 10, 1976, a notice entitled "Assessment of Countervailing Duties on Float Glass from Belgium" was issued by the Acting Commissioner of Customs, approved by the Assistant Secretary of Treasury, published in the Federal Register, 41 F.R. 10235, and contained the announcement that notification had been received from the plaintiffs that they desire to contest the negative countervailing duty determination.

On March 15, 1976, the summons in this action was filed with the Customs Court on behalf of plaintiffs.

The pertinent statutory provisions are as follows:

Section 303(a) of the Tariff Act of 1930, as amended by section 331(a) of the Trade Act of 1974, 88 Stat. 2049 (19 U.S.C., section 1303):

Countervailing duties:

(a) *Levy of countervailing duties.*—(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

* * * * * * *

(3) In the case of any imported article or merchandise as to which the Secretary of the Treasury (hereafter in this section referred to as the Secretary has not determined whether or not any bounty or grant is being paid or bestowed—

(A) upon the filing of a petition by any person setting forth his belief that a bounty or grant is being paid or bestowed, and the reasons therefor, or

(B) whenever the Secretary concludes, from information presented to him or to any person to whom authority under this section has been delegated, that a formal investigation is warranted into the question of whether a bounty or grant is being paid or bestowed,

the Secretary shall initiate a formal investigation to determine whether or not any bounty or grant is being paid or bestowed and shall publish in the Federal Register notice of the initiation of such investigation.

(4) Within 6 months from the date on which a petition is filed under paragraph (3)(A) or on which notice is published of an investigation initiated under paragraph (3)(B), the Secretary shall make a preliminary determination, and within 12 months from such date shall make a final determination, as to whether or not any bounty or grant is being paid or bestowed.

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

* * * * * * *

Section 516(d) of the Tariff Act of 1930, as amended by section 321(f)(1) of the Trade Act of 1974, 88 Stat. 2048 (19 U.S.C. 1516):

Petitions by American manufacturers, producers, or wholesalers:

* * * * * * *

(d) *Contest of Secretary's determination that foreign merchandise is not being sold in United States at less than fair value or that bounty or grant is not being paid—*

Within 30 days after a determination by the Secretary—

(1) under section 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or

(2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed,

an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the U.S. Customs Court contesting such determination.

* * * * * * *

28 U.S.C. 1582:

Jurisdiction of the Customs Court:

* * * * * * *

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended.

The facts relating to the programs established by the Belgian Government and the assistance covered by them are not in dispute. The information submitted to the court on these cross-motions for summary judgment is subject to some extent to a protective order entered by the court on June 9, 1977, and modified on July 13, 1977.

In July 1959 the Belgian Government established a regional aid program under which certain benefits were extended in order to encourage the establishment, extension, conversion, and modernization of facilities. Originally, this aid applied to any portion of the country but was subsequently limited to areas specifically designated as less-developed regions.

The system of incentives for investment was organized by the Economic Expansion Act of December 30, 1970. The decisions rested with the Minister of Economic Affairs, while the criteria for obtaining benefits were set forth by:

1. The act itself;
2. Royal decrees or executory measures;
3. General guidelines with the Department of Economic Affairs.

The Economic Expansion Act defined certain conditions which a particular project must satisfy in order to receive benefits. The investment must take place in a designated development area; it must directly contribute to the expansion, conversion, or modernization of the business; and must conform to the general economic interests. These interests were defined by Royal decree, dated August 18, 1959, and included the following:

1. The creation of work in the framework of employment policy;
2. The creation of new industries and the manufacturing of new products;
3. The development of existing businesses which are adaptable to new market conditions;
4. The improvement of the situation in economically depressed areas;
5. The more rational use of Belgium's economic resources;
6. The improvement of working conditions, manufacturing conditions through increased profits and the quality of products; and
7. The development of research equipment.

Under the above programs, assistance was given by the Belgium Government, insofar as this case is concerned, in four categories:

Low-interest loans were made available in the form of interest rate rebates. Such rebates, up to a maximum of 5 percent for 5 years, could be applied to investment loans granted by approved financial institutions. Both BSN and GSR utilized this benefit.

Investment subsidies in the form of cash grants were provided pursuant to article 9 of the Economic Expansion Act of December 30, 1970. These cash grants were provided to the extent that a company made investments from its own funds. The grant replaced the interest rate rebate. In other words, to the extent that a company made investments from its own funds, the interest rate rebate may be replaced by capital grants of equal value. A capital grant was provided only if the financial contribution made by the investing company from its own funds exceeded 50 percent of the cost of the program. BSN utilized the benefits of investment subsidies, while GSR did not avail itself of this benefit.

Pursuant to article 15, section 1 of the Economic Expansion Act of December 30, 1970, and article 12 of the Economic Expansion Act of July 14, 1966, firms were authorized to apply an annual rate of depreciation equal to twice the normal rate of depreciation over a period of 3 consecutive tax years for such investments which were made under this program. GSR availed itself of this benefit, while BSN did not.

Exemptions from real estate taxes were provided for under article 16 of the Economic Expansion Act of December 30, 1970. Under this provision firms which qualify for regional aid benefits may be exempt, for a maximum of 5 years, from paying real estate taxes. The exemption from real estate taxes was utilized by BSN, but not by GSR.

The record further establishes that at the time of the issuance of the "Notice of Final Countervailing Duty Determination" *supra*, with respect to float glass from Belgium, the Treasury Department had before it information which indicated the recipient glass producers sold a preponderance of their production in the European market (not less than 85 percent) and that the level of exports to the United States was a small percentage of the amount exported. The notice also stated that the amount of assistance provided by the regional incentive programs amounted to less than 2 percent of the value of the float glass in Belgium.

In a recent decision, *ASG Industries, Inc., et al* v. *United States*, 67 CCPA——, C.A.D. 1237 (1979), which involved float glass manufactured in West Germany, the court considered benefits such as low-interest loans, investment subsidies in the form of cash grants, and tax credits granted under regional development programs. The court therein found the benefits to be bounties or grants and made the following observations:

> Also, we hold that, for purposes of the countervailing duty law, the benefits (as analyzed above) bestowed by West Germany upon float glass manufacturers under the regional development programs were bounties or grants.[13]
>
> At the same time, it must also be pointed out that appellants' proposed test (any benefit, that is not *de minimis*, bestowed by a

foreign government in connection with the production of merchandise requires a countervailing duty) ignores the clear wording of the statute. Once it has been determined that a bounty or grant is being paid or bestowed, 19 U.S.C. 1303(a)(1) provides that "there shall be levied * * * a duty equal to the *net amount* of such bounty or grant." [Italic supplied.] Such language implies that certain deductions may be made from the actual payments to calculate the net bounty or grant and that all relevant circumstances are to be taken into account.[14]

[13] The Customs Court said "it would appear that bounties or grants were bestowed on the production of float glass in the Federal Republic of Germany."

[14] Congress reiterated this net amount concept in the legislative history of the extension of the waiver provision (note 9, supra): "The countervailing duty, which is imposed in addition to regular duties, is equal to the *net amount* of the bounty or grant and is intended to offset the *advantage* afforded by the foreign subsidy practice." [Italic added.] S. Rep. No. 96–45, 96th Cong., 1st sess. 2, reprinted in (May 1979) United States Code Cong. & Ad. News No. 3, 488, 489.

With respect to the waiver provision, section 303(d), as amended by section 331(a) of the Trade Act of 1974, 88 Stat. 1978, 2049, the court in its decision stated as follows:

By section 331(a) of the Trade Act of 1974, Public Law No. 93–618, 88 Stat. 1978 (1975), Congress amended section 303 of the Tariff Act of 1930. Under new section 303(d) (19 U.S.C. 1303(d) (Supp. V 1975)),[9] which was added by this amendment, the Secretary could waive imposition [10] of a countervailing duty if: (1) Steps were taken to reduce substantially or eliminate the adverse effect of the bounty or grant; (2) there was reasonable prospect of trade agreements reducing or eliminating barriers to, or other distortions of, international trade; and (3) imposition of a countervailing duty would be likely to seriously jeopardize the negotiation of such agreements. 19 U.S.C. 1303(d)(2) (A)–(C).

During consideration of the bill (H.R. 10710) that became the Trade Act of 1974, it was made clear that all three conditions must be met before the Secretary could waive application of a countervailing duty, and it was emphasized that "either the bounty or grant or its adverse effect must be eliminated (or substantially reduced) before the Secretary would have authority to waive the imposition of a countervailing duty order during trade negotiations." It was explained that the amendments to the countervailing duty law "are designed to tighten the administration" of that law. S. Rep. No. 93–1298, 93d Cong., 2d sess. 185 and 187, reprinted in [1974] U.S. Code Cong. & Ad. News 7320 and 7322. * * *

Congress also made clear its understanding that "the present [countervailing duty] statute is mandatory in terms." H.R. Rep. No. 93–571, 93d Cong., 1st sess. 73 (1973). This demonstrates that, except for the waiver provision in the 1974 act, the Secretary has not had any discretion to not impose a countervailing

duty once it has been determined that a bounty or grant is being paid or bestowed. *American Express Co.* v. *United States*, 60 CCPA 86, 93, 472 F. 2d 1050, 1056 (1973).* * *

[9] 19 U.S.C. 1303 (d) (Supp. V 1975) reads as follows:

"(d) *Temporary provision while negotiations are in progress.*

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with U.S. interest, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

"(2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the 4-year period beginning on January 3, 1975, that—

"(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

"(B) there is a reasonable prospect that, under section 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

"(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such 4-year period. This paragraph shall not apply with respect to any case involving non-rubber footwear pending on January 3, 1975, until and unless agreements which temporize imports of non-rubber footwear become effective.

"(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register."

[10] The Secretary's authority to waive imposition of countervailing duties was extended to July 26, 1979 (date of enactment of the Trade Agreements Act of 1979, Public Law No. 96–39), retroactive to January 3, 1979, when the previous waiver authority expired. Public Law No. 96–6, 93 Stat. 10 (1979).

It is to be noted no question of waiver by the Secretary is involved herein. The benefits granted are, under the above decision, bounties

or grants subject to countervailing duty. It is the function of the Secretary in cases involving bounties or grants to determine the net bounty. Since the Secretary in this case determined that no countervailing duty was attached, no such finding was made. The Court of Customs and Patent Appeals in C.A.D. 1237, supra, made the following comment:

> Once it is established that a foreign manufacturer is receiving payments *such as those here involved* (*not* "every payment", as the dissenting opinion imagines) from its government, a countervailing duty *must*, absent a waiver by the Secretary, be imposed unless, in considering all circumstances surrounding the payment, certain deductions can be established resulting in no net benefit to that manufacturer. These deductions must be established by facts [16]—not by mere allegations of the foreign government or of the enterprises receiving the bounty or grant. Needless to say, without an adequate factual record, neither this court nor the Customs Court can perform a meaningful judicial review of countervailing duty determinations.
>
> [16] If the Treasury Department cannot, with its expertise, establish the necessary facts, a countervailing duty must be imposed, although a challenge may be brought later by the importer. Because the importer is in a better position to obtain these facts from the foreign manufacturer, once a prima facie case has been established by the evidence that payments *such as those here involved* are being made, the domestic manufacturer should not (contrary to the dissenting opinion) have the burden of obtaining evidence of deductions necessary to negate its own prima facie case. Also, we note that under 19 U.S.C. 1303(a)(5), the Secretary is permitted to *estimate* the net bounty (i.e., estimate the necessary deductions), and his expertise will pay a part in this estimate as long as there is a factual basis to support it.

In view of the foregoing, plaintiffs' motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied.

It is further ordered that the Secretary of the Treasury: (1) Ascertain and determine or estimate the net amount of bounties or grants paid or bestowed upon the manufacture or production of float glass in Belgium by Boussois-Souchan-Neuvesel and Glaceries de Saint-Roch; and (2) direct the appropriate Customs officers throughout the United States to assess countervailing duties in the net amount equal to said bounties or grants, entered or withdrawn from warehouse for consumption on or after the day following the date of entry of this order.

(C.D. 4864)

AMERICAN EXPORT LINES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 78-1-00174

Ship Repairs

Letters filed by plaintiff, containing a challenge to the liquidation of vessel repair duties, held to be a protest which was timely filed. Consequently, a Customs Service decision, denying the request for remission of duties, held to be the notice of denial of the protest within the provisions of 28 U.S.C. 2631(a), and a summons, filed more than 180 days after that notice of denial, was untimely.

JURISDICTION—FOREIGN REPAIRS TO U.S. VESSEL

Plaintiff, the owner of a vessel documented under the laws of the United States to engage in foreign or coasting trade, seeks review in the Customs Court of the denial of remission of duties assessed on repairs made overseas to its vessel. Section 466, Tariff Act of 1930, as amended.

SECRETARY OF TREASURY—REMISSION OF DUTIES—EVIDENCE OF CASUALTY LOSS

If the owner of a vessel furnishes evidence that the vessel was compelled by stress of weather or casualty to make repairs to secure safety and seaworthiness of the vessel to reach her port of destination, the Secretary of the Treasury may remit or refund repair duties assessed. Section 466(b)(1), Tariff Act of 1930, as amended. *Suwannee Steamship Co.* v. *United States*, 354 F. Supp. 1361, 70 Cust. Ct. 327, C.R.D. 73-3 (1973).

PETITION FOR REMISSION OF DUTY—CUSTOMS REGULATIONS

Under the terms of section 4.14(h) of the Customs Regulations, the Customs officials may liquidate the vessel repair entry without giving notice regarding the application for remission, if plaintiff fails to provide substantiating documents required by the regulation.

JURISDICTION—LIQUIDATION—CHARACTER OF PROTEST

If a letter includes sufficient information to apprise the Customs officials that the plaintiff was challenging the liquidation of vessel repair duties, the letter will be considered as a protest. In Customs jurisprudence, there are no formal rules for the manner in which objections should be expressed.

JURISDICTION—SUMMONS—TIME OF FILING

28 U.S.C. 2631(a) requires a summons to be filed within 180 days from the date of mailing of notice of denial of a protest.

EQUITABLE ESTOPPEL—CUSTOMS CASES

The doctrine of equitable estoppel does not apply to Customs cases if plaintiff has not shown that Customs Service was instrumental in plaintiff's failure to meet statutory or regulatory require-

ments in the collection or refund of duties on imports. *Air-Sea Brokers, Inc.* v. *United States*, 596 F. 2d 1008, 66 CCPA 64, C.A.D. 1222 (1979).

[Judgment for defendant.]

(Decided July 24, 1980)

Haight, Gardner, Poor & Havens (*M. E. DeOrchis, Brian D. Starer* and *Nicholas H. Cobb* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Madeline B. Kuflik* on the briefs), for the defendant.

RE, Chief Judge: In this action, plaintiff sues to recover duties assessed on repairs made overseas to its vessel, the *C.V. Lightning*. On the ground that plaintiff failed to comply with procedural requirements, the defendant has moved to dismiss the action for lack of jurisdiction.

The repairs, for which plaintiff seeks a remission of duties, arose from an unexpected grounding suffered by the vessel as it was departing New York for Europe. Although the crew was able to release the ship in a matter of seconds, the ship's master nevertheless anchored for damage inspection. After inspection by both the ship's crew and an American Bureau of Shipping engineer, the *C.V. Lightning* was found to be seaworthy, and departed from New York.

After docking at Bremerhaven, West Germany, the vessel underwent another inspection for damage. As a result of this inspection, an American Bureau of Shipping surveyor in Bremerhaven declared the vessel unseaworthy, and required that repairs be made before he would authorize a return voyage.

After the repairs were made, the vessel returned to New York, and pursuant to section 466(a) of the Tariff Act of 1930, as amended, duties were assessed on the cost of the foreign repairs. This statute provides for a duty of 50 per centum to be assessed on the cost of repairs made in a foreign port on a vessel, documented under the laws of the United States, engaged or intended to engage in foreign or coasting trade. Section 466(b)(1) [1] also provides that if the owner of the vessel furnishes good and sufficient evidence that "such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to * * * make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination," the Secretary of the Treasury may remit or refund the duties. *See Suwannee Steamship Co.* v. *United States*, 354 F. Supp. 1361, 70 Cust. Ct. 327, C.R.D. 73-3 (1973).

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[1] This section was redesignated as sec. 466(d) under a 1978 amendment to the Tariff Act of 1930. Public Law 95-410, sec. 206(2).

Plaintiff does not dispute the amount of the duties assessed, but contends that the casualty suffered by the *C. V. Lightning*, in running aground, falls within the remission provision of section 466(b)(1). Plaintiff asserts that no duties should have been assessed on the cost of the repairs, or, in any event, the duties exacted should be remitted or refunded.

Defendant denies that the grounding of the *C. V. Lightning* constituted a casualty within the regular course of the voyage. Hence, the defendant contends that plaintiff does not qualify for the remission of duties authorized by section 466(b)(1). Moreover, defendant maintains that, since plaintiff failed to comply with essential procedural requirements, it is not entitled to prosecute this action for remission of the foreign repair duties.

Specifically, defendant maintains that plaintiff failed to comply with two procedural requirements: (1) The regulatory mandate under 19 CFR 4.14 for filing log abstracts within 90 days after filing petition for remission of repair duties; and (2) the statutory requirement under 19 U.S.C. 1514 for filing a protest within 90 days after the posting of notice of liquidation.

Plaintiff, on the other hand, contends that (1) the Customs Service failed to comply with its own regulations by not sending plaintiff a denial of its remission petition; and (2) the proper time for initiating a protest for the remission of foreign repair duties is 90 days from denial of the remission petition.

Plaintiff argues that, even if the date of liquidation is held to be the date on which the 90-day period began to run, plaintiff's action was nonetheless filed timely through the letters it sent to Customs within 90 days after liquidation. Plaintiff also maintains that defendant should be estopped from raising any jurisdictional defenses arising from procedural defects, as defendant was instrumental in determining the procedures plaintiff should follow.

The procedure for seeking remission of duties on vessel repairs prior to liquidation is set forth in 19 CFR 4.14 of the Customs Regulations. Section 4.14 requires filing of Customs Form 3415: Declaration of Foreign Repairs to Vessels, upon entry, and filing of an application for remission of duties within 90 days from the date of entry. Evidence of the compelling nature of the repairs, including abstracts of the ship's log, must be filed within 90 days after the filing of the application. The regulation provides for the Customs officials to reach a determination on the application, and to notify the applicant of the determination.

Although various claims have been advanced, the crucial questions presented pertain to the necessary procedures to obtain a remission of duties, and whether the parties have complied with these pro-

cedures. It cannot be disputed that confusion existed for both parties as to the proper method to obtain administrative review of the decision to impose assessment of foreign repair duties.

There is a long chronological list of filings and responses between the parties in the attempt to gain remission of duties. After the *C.V. Lightning* returned to New York, plaintiff filed, on June 27, 1974, a vessel repair entry. On July 1, 1974, plaintiff submitted a letter addressed to the U.S. Customs Service at New York requesting that no duties be assessed on the ship's foreign repairs. Certain required documents were submitted with that letter, but no repair cost breakdown or log abstract was submitted at that time. On August 20, 1975, plaintiff forwarded the final repair cost invoices. However, no log abstracts were ever submitted.

Plaintiff claims that it never received a response from Customs to its request for remission of the repair duties. Defendant maintains that plaintiff was sent a denial, but has not produced a file copy.

The entry was liquidated on October 24, 1975. Shortly after receipt of the bill, i.e., a statement of the amount of liquidated duties, on or about November 5, 1975, plaintiff wrote a letter to the Commissioner of Customs, Washington, D.C., requesting cancellation of the duties. On the following day, a copy of this letter was sent to the Customs officials in New York. Plaintiff attached a cover letter to the November 5 letter, asking that the New York office forward plaintiff's request to the Washington office.

Plaintiff received further bills from Customs for payment of the vessel repair duties, but received no reply to its November letters. On January 7, 1976, plaintiff again wrote to the Customs officials in Washington, D.C., for a response to the November letters. On February 5, 1976, Customs informed plaintiff that the November letters had never been received.

Plaintiff responded by sending another letter to Customs, repeating the information contained in the November 1975 letters, together with a request for the cancellation of the vessel repair duties. Customs denied this request in a letter dated January 14, 1977.

On April 7, 1977, plaintiff's attorneys wrote to Customs, supplying supplemental information on plaintiff's claim, and asked for reasons for the denial. By letter dated July 28, 1977, Customs reaffirmed its prior denial.

Plaintiff filed a formal protest against the Customs decision on September 27, 1977. On October 7, 1977, Customs again denied this protest, and on January 30, 1978, plaintiff filed a summons to commence this civil action. Whether or not this action was commenced within the jurisdictional requisite depends upon the legal effect of the documents filed.

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On July 1, 1974, plaintiff filed a remission application but never filed the required log abstracts. Although defendant maintains that the Customs Service notified plaintiff of the denial of the petition, plaintiff contends that it never received the notification, and that Customs liquidated the entry without completing the procedures for the remission petition. Plaintiff submits that, to require it to file a formal protest within 90 days after liquidation, as urged by defendant, would result in plaintiff's initiating a second review procedure while a prior review procedure, i.e., the remission application, was still pending.

According to plaintiff, the proper time for filing a protest is 90 days after the final decision on its application for remission of the duties rather than 90 days after liquidation. Under this interpretation, plaintiff contends that it would not be required to file a formal protest until after notification of the determination on the remission petition.

In support of its position, plaintiff cites 19 U.S.C. 1514(b)(2)[2] which reads in pertinent part:

> (2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such Customs officer within 90 days after but not before—
>
> (A) Notice of liquidation or reliquidation, or
>
> (B) In circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

Plaintiff submits that protests regarding repair remissions are governed by subparagraph (B). Under the circumstances presented, the court does not agree. Subsection (a) of section 1514 requires decisions of the Customs officer to be final and conclusive unless a protest is filed as provided in section 1514. Decisions specifically included are "the legality of all orders and findings entering into the same, as to * * * (3) all changes or exactions of whatever character within the jurisdiction of the Secretary of the Treasury, [and] (5) the liquidation or reliquidation of an entry, or any modification thereof."

The provision for repair duty remission petitions under section 4.14 of the Customs Regulations does not create the circumstances in which liquidation is inapplicable, as required by subparagraph (B). The procedures provided for by section 4.14 were all designed to be completed *prior* to liquidation.

Section 4.14(e) of the regulations explicitly states in part:

> Inasmuch as an unprotested liquidation insofar as it relates to the classification of items under section 466(a) of the Tariff Act of 1930, as amended, is final at the expiration of 90 days, a subsequent application in regard to such classification cannot be considered in the absence of a timely protest.

[2] This section was redesignated 19 U.S.C. 1514(c)(2) as of Jan. 1, 1980, with no change in language.

Moreover, under section 4.14(h), if the applicant fails to file timely the required evidence, Customs may liquidate the entry *without* notifying the applicant of a determination of its remission petition. Thus, since plaintiff did not file the required log abstracts, two review procedures were not, as plaintiff suggests, pending simultaneously. Rather, by not complying with the regulation in filing the required log abstracts, plaintiff failed to qualify for a determination of its remission petition.

Section 4.14(h) of the Customs Regulations expressly provides that:

> (h) The evidence * * * shall be furnished to the District Director (of Customs) within 90 days after an application is filed. *If such evidence is not received within the 90-day period, the entry shall be liquidated without regard to the application* unless the District Director [of Customs] shall have approved an extension of such period. [*added.*]

Thus, since the plaintiff failed to complete its application, and no extension was approved, under the regulation Customs could liquidate the entry "without regard to the application."

The finality of duty assessment, i.e., the liquidation, was designed to eliminate confusion, and guarantee a final reckoning of an importer's liability for a specific entry. Thus, under 19 U.S.C. 1514 all objections to duty assessment must be raised by the filing of a protest within 90 days of liquidation. As previously noted, these include the legality as well as the correctness of a liquidation. *See United States* v. *A. N. Deringer, Inc.*, 593 F. 2d 1015, 66 CCPA 50, C.A.D. 1220 (1979).

Plaintiff maintains that it properly commenced its action through the November letters that it mailed to Customs. Within 90 days after liquidation, plaintiff sent Customs two letters relating to the repair duties. It is plaintiff's contention that these letters constituted a valid timely filed protest of the liquidation.

It is basic to Customs law that protests are not to be strictly construed. Quoting an earlier appellate case, the court, in *Norwood Imports* v. *United States*, 48 Cust. Ct. 1, 3, C.D. 2306 (1961), explained: "The statute requiring a protest on the part of importers was not designed for men learned in the law and trained to the niceties in pleading but for men engaged in commercial pursuits. Numerous cases addressing the issue of what constitutes a sufficient protest have been reviewed at length in *Mattel, Inc.* v. *United States*, 377 F. Supp. 955, 72 Cust. Ct. 257, C.D. 4547 (1974). In *Mattel*, Judge Maletz described the standards for determining the sufficiency of a protest:

> While no formal rules have been devised for the manner in which such objections should be expressed, the court has held letters to be sufficient as protests where they conveyed to the

> Customs officials the objection in the mind of the protesting party so that the former would have an opportunity to review their decision and take action accordingly. *Id.* at 260.
>
> In short, the court, taking a liberal posture, has held that, however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of section 514 *if it conveys enough information to appraise knowledgeable officials of the importer's intent and the relief sought. Id.* at 262. [Italic added.]

See also *B. F. Pantoja* v. *United States*, 83 Cust. Ct. 170, C.R.D. 79–17 (1979), and *Labay International, Inc.* v. *United States*, 83 Cust. Ct. 152, C.D. 4834 (1979).

Although the November 5, 1975, letter may have omitted some of the niceties of a formal protest, it nonetheless conveyed sufficient information to apprise the Customs officials that the plaintiff was protesting the liquidation on October 24, 1975, of the vessel repair duties. The letter dated November 5, 1975, and sent to the Commissioner of Customs, made clear the plaintiff's objection in the following language:

> The purpose of this letter is to ask that *consideration be given toward the cancellation of the above mentioned duties* in view of the fact that the vessel would not be allowed to return to the United States unless repairs were carried out overseas. [Italic added.]

The letters in issue have been carefully examined to determine their meaning and effect. From the language used, there is no question that the plaintiff objected to the assessment of the repair duties. Judicial decisions teach that there are no formal rules for the manner in which objections should be expressed in a protest. *United States* v. *Sheldon & Co.*, 5 Ct. Cust. Appls. 427, 429, T.D. 34946 (1914), a germinal case, states the applicable principle of Customs law that:

> * * * a protest * * * must show fairly that the objection afterwards made at the trial was in the mind of the party at the time the protest was made and was brought to the knowledge of the collector to the end that he might ascertain the precise facts and have an opportunity to correct the mistake and cure the defect if it was one that could be obviated.

Plaintiff received repeated requests from Customs for payment of the repair duties but received no response to its letters. Finally, after much correspondence between the plaintiff and the Customs Service, and a repetition of plaintiff's objection, the plaintiff was notified on January 14, 1977, that its request for cancellation of duties had been denied. The Customs Service, in rendering a full administrative review, included an explanation of that negative decision, and stated that the casualty loss that gave rise to the repairs "took place before the voyage commenced." *See Suwannee Steamship Co.* v. *United States*, 435 F. Supp. 389, 390, 79 Cust. Ct. 19, 21, C.D. 4708 (1977).

The November 5, 1975, letter, which was a valid protest timely filed against the liquidation of October 24, 1975, was followed by the Customs Service's decision of January 14, 1977, denying the remission of the repair duties. This denial must be regarded as the notice of denial of that protest within the scope of 28 U.S.C. 2631(a). The letter of denial, dated January 14, 1977, admittedly received by the plaintiff, commenced the running of the 180-day statutory limit for the filing of a summons. The letter of Customs dated July 28, 1977, merely reaffirmed its prior denial and did not cause the 180-day statutory period to commence again.

As January 30, 1978, the date plaintiff filed its summons, is more than 180 days after the date of the mailing of the Customs Service letter of January 14, 1977, this action must be dismissed because of untimeliness.

Plaintiff also maintains that the defendant should be estopped from asserting a timeliness defense. Plaintiff, however, has not shown that Customs was instrumental in plaintiff's failure to meet either the statutory or regulatory requirement. Plaintiff has presented no evidence that Customs refused tender of either the log abstracts or a sufficient protest.

It is clear that Customs, as well as plaintiff, is bound by the pertinent statute, and may not waive jurisdictional defects. Moreover, as recently noted by Judge Miller, writing for the Court of Customs and Patent Appeals:

> (E)quitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection or refund of duties on imports. *Air-Sea Brokers, Inc.* v. *United States*, 596 F 2d 1008, 1011, 66 CCPA 64, C.A.D. 1222 (1979).

Since the summons to contest the denial of the protest was not timely filed, the defendant's motion to dismiss is granted.

Judgment will be entered accordingly.

(C.D. 4865)

ELBE PRODUCTS CORP., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 78–1–00124

Imitation leather

I. By the provisions of headnote 1(vii) to part 4, subpart C of schedule 3, TSUS, the imported merchandise, consisting of a nonwoven fiber substrate and plastic coatings of polyurethane and poly-

vinyl chloride, used as shoe linings, is specially provided for in schedule 7 or elsewhere and, accordingly, excluded from classification under part 4, subpart C of schedule 3, TSUS.

II. The visual and tactile qualities of the plastic coatings which impart to the subject merchandise its ability to serve as imitation leather causes said merchandise to be almost wholly of * * * plastic within the meaning of the superior heading to item 771.42, TSUS, and, accordingly, properly classified under said item of the Tariff Schedules of the United States.

[Judgment for plaintiff.]

(Decided July 25, 1980)

Mandel & Grunfeld (*Steven P. Florsheim* at the trial and on the briefs; *Robert B. Silverman* on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*John J. Mahon* at the trial and on the brief), for the defendant.

BOE, Judge: The subject merchandise in the above-entitled action, described in the commercial invoices included in the official entry papers as "Forrita 80" and "Plantilla 80," was exported from Spain and entered at the port of New York in November 1976.

The articles in question were classified under item 355.25, TSUS, as modified by Presidential Proclamation 3822, 82 Stat. 1455, T.D. 68–9, providing:

	Webs, wadding, batting, and nonwoven fabrics, including felts and bonded fabrics, and articles not specially provided for of any one or combination of these products, all the foregoing, of textile materials, whether or not coated or filled:	
	* * * * * * *	
355.25	Of man-made fibers	12¢ per lb. + 15% ad val.

The defendant alternatively asserts that the merchandise in question is properly classified under item 359.50, TSUS, providing:

	Textile fabrics, including laminated fabrics, not specially provided for:	
	* * * * * * *	
359.50	Of man-made fibers	25¢ per lb. + 30% ad val.

In its presentation to this court the plaintiff urges as its primary claim that the subject merchandise be classified under item 771.42, TSUS, providing:

	Film, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and	

	other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics:	
	Of cellulosic plastics materials:	
	* * * * * * *	
	Not of cellulosic plastics materials:	
	Film, strips, and sheets, all the foregoing which are flexible:	
* * *	Made in imitation of patent leather	* * *
771.42	Other	6% ad val.
	Of polyester	
	Of polyvinyl chloride	
	Of polyethylene	
	Of polypropylene	
	Other:	

In the alternative the plaintiff contends that the subject merchandise be classified under item 774.60, TSUS, providing:

	Articles not specially provided for, of rubber of plastics:	
	* * * * * * *	
774.60	Other	8.5% ad val.

and in the further alternative under item 359.60, TSUS, providing:

	Textile fabrics, including laminated fabrics, not specially provided for:	
	* * * * * * *	
359.60	Other	8.5 ad val.

It has been stipulated by the parties that "* * * the subject merchandise in its imported condition, consists of strips or sheets made or cut into rectangular pieces over 15 inches in width and over 18 inches in length." R. at 5. It is admitted by the pleadings that the merchandise in question is flexible and not of cellulosic plastics materials.

From the evidence submitted, which likewise appears to be undisputed, "Plantilla 80" and "Forrita 80" are manufactured principally for use as linings in footwear. The former is designed for use as a sock lining covering the inner sole of the shoe; the latter is designed for use as an inside lining of the upper shoe. The subject articles consist of nonwoven fibers and plastic coatings.

In the manufacture of the nonwoven fabric, dry, cut fibers are laid out in the form of a web on a conveyor belt, thereby permitting the fibers to be immersed in a bath of synthetic latex. In a subsequent drying process, the latex and the fibers are bound together into a thin substrate.[1] This fabric, processed as afore-referred to, is sold in rolls to

[1] Illustration of the texture of the processed substrate is evidenced by plaintiff's exhibits 5A and 5B.

the manufacturer of "Forrita 80" and "Plantilla 80" for use in the manufacture of the merchandise in question.

In the production of the subject merchandise a thin layer of liquid polyurethane paste is applied to a special siliconized paper. As the coated paper is heated and dried in an oven, the solvent contained in the paste evaporates, leaving a solid polyurethane remainder. A layer of liquid polyvinyl chloride (PVC) is spread upon the hardened polyurethane layer and again passed through an oven in order to effect a partial drying of the applied PVC. A layer of plastic adhesive is then spread upon the semi-rigid polyvinyl chloride, on which the nonwoven fabric is then placed. This layered arrangement, consisting of the paper, polyurethane, polyvinyl chloride, plastic adhesive, and the nonwoven fabric, is passed through an oven causing the polvyinyl chloride to be expanded and blown by the heating process. After cooling, the paper is released and to the surface of the plastic a lacquer is applied. When trimming and cutting are completed, the manufactured articles are in the form and constituency of the "Forrita 80" and "Plantilla 80", imported in rolls as the subject merchandise in the instant action.

The question presented for determination herein is illustrative of the imperspicuity encountered in the application of the provisions of schedule 3, TSUS, and the application of the provisions of schedule 7, TSUS, with respect to an article which may consist of materials in part provided for in each of said schedules. An examination of the Tariff Classification Study affords the opportunity to review the historical evolution of the present tariff schedules as they relate to the respective controverted classifications urged in the instant action. Clearly, there has been a failure to attain the clarity and specificity originally desired in their adoption.

Headnote 1(vii) to part 4, subpart C of schedule 3, TSUS, excludes from classification therein "other articles specially provided for in schedule 7 or elsewhere." Our inquiry in the present action, therefore, initially turns to a determination whether item 771.42, TSUS, as claimed by the plaintiff, serves to classify articles particularly characterized by the merchandise in question. An affirmative answer thereto precludes the classification of the merchandise under item 355.25, TSUS, as determined by the Customs Service or under the alternative classifications, items 359.50 or 359.60, TSUS, as urged respectively by the defendant and the plaintiff. *United States* v. *Canadian Vinyl Industries, Inc.*, 64 CCPA 97, C.A.D. 1189, 555 F. 2d 806 (1977).

The superior heading to 771.42, TSUS, requires that merchandise classified thereunder be "wholly or almost wholly of * * * plastics." As defined by general headnote 9(f)(iii), TSUS, " 'almost wholly of' means that the essential character of the article is imparted by the

named material, notwithstanding the fact that significant quantities of some other material or materials may be present."

From the evidence adduced at the trial of the within action, the court can only conclude that the essential character of the subject merchandise is imparted by the plastic coatings, notwithstanding the presence therein of nonwoven fibers. It is undisputed that in serving as linings in footwear, only the plastic surfaces of "Forrita 80" and "Plantilla 80" are exposed. The nonwoven backing provides a substrate permitting the permanent attachment of the subject merchandise within the shoe. It is significant that all witnesses, in behalf of the plaintiff as well as the defendant, agree that the foremost characteristic which an imitation leather product, such as "Forrita 80" and "Plantilla 80", must possess is an appearance simulating genuine leather. Without exception, it is acknowledged that such a characteristic is exhibited in the subject merchandise and imparted thereto solely by the plastic coatings.

The evidence further discloses that the subject merchandise possesses other qualities singularly characteristic of leather products. The plastic coatings applied to "Forrita 80" and "Plantilla 80" in the manufacturing process provide a soft feel, closely resembling the feel of leather. The smooth surface of the plastic coatings provides a resistance to abrasions, thereby protecting the inner shoe linings from wear as a result of the constant contact with the foot. From the testimony of plaintiff's witnesses it appears that because of the particular interest of customers, within the commercial shoe industry, in obtaining merchandise possessing the afore-described simulated qualities and characteristics of leather, little or no attention is given by these customers to the fabric substrate.

In its effort to demonstrate that the essential character of the subject merchandise is not imparted by the plastic coatings, the defendant offered evidence relating to certain qualities therein allegedly provided by the presence of the nonwoven fibers. Although it appears to be without dispute that the nonwoven fibers may contribute to additional characteristics possessed by "Forrita 80" and "Plantilla 80," such as tear-resistance, stretchability and burst-strength, the court does not find from the testimony that the presence of the nonwoven fibers or their contribution to such additional characteristics possessed by the subject merchandise serves to alter the essential character thereof. On the contrary, defendant's witnesses concede that the nonwoven fiber, alone and without the plastic latex binder applied thereto, possesses little strength and would, in fact, fall apart if it were to be picked up or handled. Only the combination of the plastic coatings, the nonwoven fibers and the plastic latex binder applied to such fibers provide the tear-resistance and stretch characteristics which the defendant seeks to attribute to the nonwoven fiber.

Viewing all of the evidence in its entirety, this court concludes that it is the visual and tactile qualities of the plastic coatings which impart to the subject merchandise its ability to serve as an imitation leather. Notwithstanding any qualities as to the durability and strength of the subject merchandise to which the nonwoven fibers may contribute, the essential character thereof is imparted by the plastic coatings and, accordingly, the merchandise is "almost wholly of * * * plastic" within the meaning of the superior heading to item 771.42, TSUS.

The defendant urges that the subject merchandise cannot be excluded from classification under part 4, subpart C of schedule 3, by virtue of headnote 1(vii) thereof, contending that the imported merchandise is not an article within the meaning of the exclusionary provisions of the headnote. In support of this contention, the defendant refers to headnote 5 in schedule 3, in which it is stated that an article consisting either in whole or in part of fabric which is coated with plastic "shall be regarded not as a textile material but as being wholly of rubber or plastics to the extent that (as used in the article) the nontransparent rubber or plastics forms either the outer surface of such article or the only exposed surface of such fabric." Citing the legislative history contained in the House report to the Tariff Schedules Technical Amendments Act of 1965, the defendant contends that headnote 5 to schedule 3, accordingly, relates solely to finished articles of the character specified in the legislative history, i.e., rainwear, hunting jackets, footwear, headwear, gloves, luggage, handbags and furniture.[2] A fortiori, the defendant argues that intermediate products, consisting of nonwoven fiber and plastic coatings, used in the finished article, therefore, are precluded by the language of headnote 5 to schedule 3 from classification as articles not specially provided for under schedule 7.

In what appears to be a full answer to defendant's contention, our appellate court has held that rolls of nylon fabric coated with a glossy polyurethane skin are articles within the meaning of headnote 1(vii) to part 4, subpart C of schedule 3 and, accordingly, properly classified under item 771.40, TSUS, as strips or sheets in imitation of patent leather. *United States* v. *Canadian Vinyl Industries, Inc.*, *supra*.

The real thrust of defendant's argument in the instant action, however, is that the majority opinion in the *Canadian Vinyl* decision is in error and that the reasoning of our appellate court in that decision should not apply herein. This court cannot agree.

Pursuant to the Customs Simplification Act of 1954, the Tariff Commission was directed—

> "to make a comprehensive study of the laws prescribing the tariff status of imported *articles*" and to "(e)stablish schedules of

[2] H. Rep. No. 342, 89th Cong., 1st Sess., 10-11 (1965).

> tariff classifications which will be logical in arrangement and terminology and adapted to the changes which have occurred since 1930 in the character and importance of *articles* produced in and imported into the United States and in the markets in which they are sold." Tariff Classification Study Submitting Report (Nov. 15, 1960) at 1. [Italic supplied.]

It is clear from the foregoing that in the drafting of the Tariff Schedules of the United States, a broad meaning was intended to be given to the term articles. The definition of that term should not be narrowed unless the context, scope, or purpose of the applicable provisions should require otherwise. *D. N. & E. Walter & Co.* v. *United States*, 44 CCPA 144, 147–48, C.A.D. 652 (1957). The enumeration of specific types of finished articles referred to in the legislative history relating to headnote 5 to schedule 3, and upon which the defendant in part bases its restricted construction of the term "article," does not preclude the use of that term in a broader connotation under other applicable tariff schedules. In the within action we are not concerned whether the imported merchandise is an intermediate product of a finished article, as urged by the defendant, but rather whether the merchandise in question is an article "specially provided for in schedule 7".[3]

Contrary to the restricted and narrow meaning of the term "articles" attributed by the defendant to the classification of the imported merchandise, it appears to have been specifically intended in the drafting of the Tariff Schedules of the United States to include under items 771.40 and 771.42, TSUS, thereof, plastic articles in imitation of leather in the very form and character as evidenced by the merchandise in question. The Tariff Classification Study, schedule 7, at 451, provides an insight with respect to the historical classification of such articles in the Tariff Act of 1930 as well as the intended purpose and purview of item 771.42, under present tariff schedules:

> "There have been significant imports of polyvinyl chloride film and sheets in imitation of *patent leather* and *fancy leather* which have been dutiable, by virtue of the similitude provision in paragraph 1559, at the rates applicable to such leathers in paragraph 1530. These rates are used for *such plastics materials* in items 771.40 and 771.42." [Italic supplied.]

This court, therefore, concludes that the merchandise in question as imported has been "specially provided for in schedule7" within the meaning and intent of headnote 1(vii) to part 4, subpart C of schedule 3. The more specific classification of the merchandise in issue provided for in item 771.42, TSUS, prevails over the "basket provision" at item

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[3] In a prior decision, *Marshall & Co.* v. *United States*, 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971), this court's opinion predicated its decision in part upon the distinction between an intermediate product and the final article. Though this distinction may be significant in some contexts, this court is unable to agree with its application in the *Marshall* decision or in the case at bar. Cognizance was not taken therein of headnote 1(vii), part 4, subpart C, schedule 3, TSUS—the determinative factor in reaching the proper classification of the merchandise in question.

774.60, TSUS, alternatively claimed by the plaintiff. See *Travenol Laboratories, Inc.* v. *United States*, 67 CCPA ——, C.A.D. 1247 (1980).

Accordingly, the court finds that the Customs Service's classification of the merchandise in issue under item 355.25, TSUS, is in error and that the claimed classification by the plaintiff with respect to the subject merchandise under item 771.42, TSUS, is correct and proper and must be affirmed.

Let judgment be entered accordingly.

(C.D. 4866)

RANK PRECISION INDUSTRIES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Television Camera Lens System

SECTION 315(d)—FINDING MADE AFTER ALLEGED CHANGE IN PRACTICE

Where entry by plaintiff and liquidation of the subject merchandise by the district director under item 708.23, TSUS, occurred more than 2 years prior to a finding by the Secretary of the Treasury (or his delegate) of an established and uniform practice in classifying the merchandise under item 685.10, TSUS, plaintiff's claim that an established and uniform practice was changed without notice in violation of section 315(d) of the Tariff Act of 1930, as amended, cannot be sustained. The statute is clear that the notice requirements for a change of practice are intended for the benefit of importers whose entries are made after a finding of an established and uniform practice. Plaintiff's contention that in 1974 (the year of importation) it relied upon the finding made in 1976 is obviously without merit.

MOUNTED LENSES (ITEM 708.23, TSUS)—"MORE THAN" DOCTRINE

The provision in item 708.23, TSUS, for mounted lenses is not applicable to merchandise which is "more than a transparent substance used to form an image fixed in a proper backing, support or setting." *Kalimar, Inc.* v. *United States*, 66 Cust. Ct. 112, 116, C.D. 4178 (1971). Hence, a Varotal 30 television camera lens system which, in addition to a mounted lens, includes many significant electrical and mechanical components that are not embraced by the common meaning of the term "mounted lens" (as determined in *Kalimar*), is more than a mounted lens within the purview of item 708.23, TSUS.

OPTICAL INSTRUMENTS—STATUTORY DEFINITION IN HEADNOTE 3, PART 2, SCHEDULE 7

In determining whether imported merchandise is classifiable as an optical instrument under the TSUS, the statutory definition of the term in headnote 3, part 2, schedule 7 is controlling. *United*

States v. *Ataka America, Inc.*, 64 CCPA 60, 65, n. 4, C.A.D. 1184 550 F. 2d 33 (1977). Under the definition of optical instruments in headnote 3, the issue is not whether the optical element is subsidiary or dominant, but rather "the statutory distinction is between 'subsidiary' and *not* 'subsidiary'". [Italic added.] (*Id.* at 66, n. 5.) Since the subject merchandise incorporates one or more optical elements which are not subsidiary with regard to the operation of the article, it is properly classifiable as an optical instrument under item 708.89, TSUS. *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, 13, C.D. 4668 (1976).

SAME—"INSTRUMENT" DEFINED

Webster's New International Dictionary (2d ed. 1950), p. 1288, broadly defines the term "instrument," as follows: "That by means of which any work is performed or result is effected; a medium; means". The Varotal 30 television camera lens system is an instrument within the foregoing definition, and within headnote 3, part 2, schedule 7, TSUS.

SAME—TELEVISION CAMERA LENS SYSTEM

The Varotal 30, which was referred to by plaintiff's witness as an "optical system" and as an "optical package," is essentially a television camera lens with a sophisticated system of electronic and mechanical controls for the iris (aperture), zoom, and focus, which are all optical features of the merchandise. Since the record shows that the major electromechanical components of the merchandise are directly related to the optical function of the lens system, the electromechanical features of the Varotal 30 do not exclude the merchandise from the definition of "optical instruments" in headnote 3, part 2, schedule 7, TSUS. *Cf. Corning Glass Works* v. *United States*, 82 Cust. Ct. 249, C.D. 4807 (1979). The "Tally" lights are ancillary and subordinate to the optical components of the merchandise.

GENERAL INTERPRETATIVE RULE 10(ij)—PARTS OF TELEVISION CAMERAS SPECIFICALLY PROVIDED FOR AS OTHER OPTICAL APPLIANCES AND INSTRUMENTS

Since the subject merchandise is specifically provided for as an optical appliance or instrument under item 708.89, TSUS, classification as part of a television camera under item 685.10, TSUS, is precluded by general interpretative rule 10(ij). *Cf. Jensen, supra*, 77 Cust. Ct. at 21.

Court No. 76-12-02771

[Dismissed without affirming classification of District Director.]

Decided July 28, 1980

Siegel, Mandell & Davidson, Esqs. (*Herbert T. Posner*, Esq. of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *Sidney N. Weiss*, trial attorney, for the defendant.

NEWMAN, Judge: This action presents for determination the proper classification, and hence the proper rate of duty, for a Varotal 30 lens package imported by plaintiff from England and entered at the port of Chicago, Ill., on June 25, 1974. In liquidating the entry, Customs classified the imported article as a mounted lens (other than projection) under item 708.23 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68–9, and assessed duty at the rate of 12.5 per centum ad valorem. As an alternative classification, the Government claims that the merchandise is encompassed by the provision in item 708.89, TSUS, as modified, for "Other (optical) appliances and instruments", for which the rate of duty is 22.5 per centum ad valorem. Plaintiff claims that the merchandise is properly dutiable at the rate of 6 per centum ad valorem under the provision in item 685.10, TSUS, as modified, for parts of television cameras.

I find that the merchandise is classifiable under item 708.89, TSUS, as alternatively claimed by the Government. Accordingly, this action is dismissed without affirming the classification of the District Director under item 708.23, TSUS.

STATUTES INVOLVED

19 U.S.C. 1202, Tariff Schedules of the United States:

Classified:		
Schedule 7, part 2, subpart A:		
Lenses, prisms, mirrors, and other optical elements, all of the foregoing whether mounted or not mounted:		
* * * * * * *		
Mounted:		
Lenses:		
* * * * * * *		
708.23	Other	12.5% ad val.
Defendant's alternative claim:		
Optical appliances and instruments not provided for elsewhere in part 2 of this schedule; frames and mountings for such articles, and parts of such frames and mountings:		
* * * * * * *		
708.89	Other appliances and instruments	22.5% ad val.
Plaintiff's claim:		
Schedule 6, part 5:		
Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation		

	recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:	
685.10	Television cameras, and parts thereof	6% ad val.

THE FACTS [1]

The Varotal 30 is a television camera lens system comprised of a number of optical, electrical, and mechanical components.[2] The primary function of this optical-electro-mechanical system is to transmit light and a focused image to the broadcast equipment, where it is converted into electrical signals.

The optical unit of the Varotal 30 contains the glasses of the lens and includes four main subassemblies: The focus unit, the zoom unit, the iris unit, and the rear unit. To the body of the optical unit are fitted three drive units for controlling the focus, the zoom, and the iris mechanism (aperture) of the lens. The iris unit consists of a system of blades that regulate the amount of light transmitted through the lens to the pickup tubes located within the television camera body, and is operated by means of an iris servo drive module. The zoom feature of the lens is accomplished by changing the positioning of the optical elements so as to vary the effective magnification of the lens.

A motor drive allows zoom by electromechanical movement of the optical elements within the system. An adjustable pan bar S type provides a zoom rate method of servo zoom control. The dual demand shot box is a programing component which provides a method of preset servo control of both focus and zoom functions. The Varotal 30 also includes a number of circuits, amplifiers, switches, and other electrical components that are necessary to power and control the operation of the lens. In addition to the electrical components, the Varotal 30 includes various mechanical components that are required for the control and power of the lens and to interface the system with

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[1] The record consists of the testimony of five witnesses called on behalf of plaintiff and one witness called by defendant. Plaintiff's witnesses were: Brendan M. Murphy, treasurer of plaintiff, Rank Precision Industries, Inc.; Kish B. Sadhvani, plaintiff's product manager; Raymond J. Smith, employed by RCA Corp. as engineering manager for camera equipment; David Frederick Shade, chief accountant for Rank Taylor Hobson, Leichester, England; and Walter David, Jr., operations manager for Optical Imports, Inc. Defendant called as its witness Dr. Leonard Bergstein, professor of electro-optical sciences at Polytechnic Institute of New York. Both parties submitted various exhibits. The official papers were received without marking.

[2] The importation, when assembled in operating condition, consists of the following component parts: Power supply module, iris servo drive module, focus servo module drive, zoom servo module drive, systems board, dual demand shot box, adjustable pan bar S type, Tally lights, focus demand control, range extender remote control, electrical connecting cables, in addition to basic 10:1 zoom lens unit.

the television camera.[3] Finally, the imported merchandise contains two Tally lights that are the means by which the performers are made aware of the camera on the air.

OPINION

I

Initially, we consider plaintiff's claim that classification of the subject merchandise by the District Director under item 708.23, TSUS, represents a change, without notice, of a prior uniform and established practice (viz, during the years 1970–72) of classifying the merchandise as parts of television cameras under item 685.10, TSUS, in violation of section 315(d) of the Tariff Act of 1930, as amended (19 U.S.C. 1315(d)). That provision reads:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of 30 days after the date of publication in the weekly Treasury decisions of notice of such ruling * * *.

At the outset, it must be determined "whether the Secretary of the Treasury (or his delegate) has made a 'finding' of 'an established and uniform practice' pursuant to section 315(d)". *Ditbro Pearl Co.* v. *United States*, 62 CCPA 95, 96, C.A.D. 1152, 515 F. 2d 1157 (1975); *Asiatic Petroleum Corp.* v. *United States*, 59 CCPA 20, 22, C.A.D. 1029, 449 F. 2d 1309 (1971). In order to establish the requisite finding under the statute, plaintiff introduced in evidence a letter by Customs dated August 31, 1976 (exhibit 3), concerning the tariff classification of "motorized television lenses for industrial television cameras produced in West Germany".[4] This letter, somewhat equivocally, states:

> (I)t appears that a uniform and established practice exists of classifying the merchandise in question under the provision for parts of television cameras, in item 685.10, TSUS.

Plaintiff contends that it "was entitled to rely upon the 'finding' made by the Customs Service" (brief, 24).

Significantly, the official papers show that the entry in this case was made on June 25, 1974, and liquidated on July 19, 1974—more than 2 years prior to the finding of an established and uniform prac-

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[3] The subject merchandise is connected directly to the front of the television camera.

[4] The "motorized television lenses" are described in the letter as follows: "These are motorized * * * television lenses for use on closed circuit vidicon television cameras. The television lenses are controlled by three motors, and power is transmitted to the lens elements and the iris by a system of cables which are attached to the television camera and the television lens".

tice, as set forth in exhibit 3. Consequently, it is obvious that at the time of importation in 1974 plaintiff could not have relied upon the section 315(d) finding made by Customs in 1976. Indeed, the statute is clear that the notice requirement for a change of practice is intended for the benefit of importers whose entries are made after a finding of an established and uniform practice. *Asiatic Petroleum Corp., supra.*

In order to substantiate the August 31, 1976 finding, plaintiff presented the testimony of its witness Murphy concerning the liquidations in 190 entries by plaintiff of Varotal systems and other merchandise [5] at the ports of New York, Chicago, and Los Angeles during the period of 1970–72.[6] It appears that of these 190 entries, 182 were liquidated as television camera parts, and 8 were liquidated as mounted lenses (R. 32).[7] Thus, rather than proving the existence of an established and uniform practice during 1970–72, Murphy's testimony demonstrates that there was some ambivalence on the part of Customs respecting the appropriate classification for the merchandise. Moreover, in a letter written on February 15, 1973, by Customs to plaintiff (exhibit A), plaintiff was notified that zoom lenses and rear units for television cameras were not classifiable as parts of television cameras in view of the specific provision in item 708.23, TSUS, for mounted lenses, citing general interpretative rule 10(ij).

In sum, since as of the liquidation date (July 19, 1974) there was no finding under section 315(d) relating to the subject merchandise, nor was there in fact an established and uniform practice during the years 1970–72 of classifying the merchandise as parts of television cameras under item 685.10, TSUS, I find that plaintiff's claim under section 315(d) is without merit.

II

We now turn to the merits of whether the Varotal 30 system was properly classified by Customs as a mounted lens under item 708.23, TSUS. Plaintiff maintains, and I agree, that the merchandise is more than a mounted lens within the common meaning of that term.[8]

As recently observed by Chief Judge Markey of our Appellate

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[5] The 190 entries included Varotal systems and parts thereof, closed circuit television systems, cables, and other parts of television cameras.

[6] The letter of Aug. 31, 1976 (exhibit 3), does not show that a uniform and established practice of classifying the merchandise under item 685.10 existed in the 1970-72 period, which is the period of time relied upon by plaintiff.

[7] Plaintiff's witness David also testified that television lens systems, manufactured by Aegeneiux and imported by Optical Imports, Inc., from 1969 to 1973, were classified and liquidated by Customs as parts of television cameras under item 685.10, TSUS.

[8] Defendant does not claim that the provision in item 708.23, TSUS, for mounted lenses should be construed in accordance with any special commercial meaning or designation that differs from the common meaning. For an in depth discussion of commercial designation see *S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 82 Cust. Ct. 197, C.D. 4802 (1979).

Court in *United States* v. *Texas Instruments*, 67 CCPA ——, C.A.D. 1244, 620 F. 2d 269 (1980):

> Only the most general of rules can be ascertained from the previous decisions dealing with the "more than" doctrine, and it appears that each case must in the first analysis be determined on its own facts. *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, 34, C.A.D. 1032, 450 F. 2d 1396, 1398 (1971) * * *.

And in *Green, supra*, the Appellate Court also stated (59 CCPA at 34):

> * * * In order to determine if an article is more than that provided for in a particular tariff provision, it is necessary to ascertain the common meaning of the tariff provision and compare it with the merchandise in issue. It is well established that in determining the common meaning of a term or word used in a tariff provision, court decisions, dictionary definitions, and other lexicographical authorities may be considered.

See also *Ozen Sound Devices* v. *United States*, 67 CCPA ——, C.A.D. 1246, 620 F. 2d 880 (1980); *The Englishtown Corporation* v. *United States*, 64 CCPA 84, 87, C.A.D. 1187, 553 F. 2d 1258 (1977).

In support of its contention that the Varotal 30 is more than a "mounted lens" within the common meaning of that term, plaintiff cites *Kalimar, Inc.* v. *United States*, 66 Cust. Ct. 112, C.D. 4178 (1971). There, a Kali-Copier for the Polaroid Swinger camera used to make copies of photographs and other objects was assessed with duty as "Other (optical) appliances and instruments" under item 708.89, TSUS, and was claimed by the importer to be properly dutiable as other mounted lenses under item 708.23, TSUS. The copier consisted of a metal frame or stand and close-up lens in a black circular casing. The Government argued that the mounted lens portion of the copier consisted only of the lens and its casing, and therefore the copier was more than a mounted lens. Hence, the issue was whether the imported copier was a mounted lens or more than a mounted lens for tariff purposes. Judge Maletz, writing for the First Division, held that the copier was more than a mounted lens, viz: it was a mounted lens with the added feature of a copying stand. In reaching its determination in *Kalimar*, the court cited and adopted the following definitions contained in *Webster's New World Dictionary of the American Language*, College Edition (1962) (66 Cust. Ct. at 116):

> Lens * * * 1. a piece of glass, or other transparent substance, with two curved surfaces, or one plane and one curved, regularly bringing together or spreading rays of light passing through it: a lens or combination of lenses is used in optical instruments to form an image: * * *.
>
> Mounted * * * 4. fixed on or in the proper backing, support, setting, etc. * * *.
>
> Mount * * * 6. to place, fix, or fasten on or in the proper support, backing, etc. for the required purpose; specifically, (a) to fix (a jewel) in a setting; (b) to fix (a specimen) on (a slide) for

> microscopic study; (c) to arrange (a skeleton, dead animal, etc.) for exhibition. * * *

Applying the foregoing definitions, the *Kalimar* court determined that the mounted lens provision in item 708.23, TSUS, was not applicable to the copier since "the importation is more than a transparent substance used to form an image fixed in a proper backing, support or setting" (id. at 116).

Similarly here, it is patently clear that while the Varotal 30 includes a "transparent substance used to form an image fixed in a proper backing, support or setting", the merchandise also includes many significant electrical and mechanical components that are not embraced by the common meaning of the term mounted lens as determined in *Kalimar*. Accordingly, I agree with plaintiff's contention that the Varotal 30 is more than a mounted lens within the purview of item 708.23, TSUS; and therefore the District Director's classification under that TSUS item was erroneous.

III

Since the Varotal 30 is more than a mounted lens, as classified by Customs, we reach defendant's alternative claim that the merchandise is classifiable under item 708.89, TSUS, as "Other (optical) appliances and instruments". In determining whether the imported merchandise is classifiable as an optical instrument under the TSUS, the statutory definition of the term in headnote 3, part 2, schedule 7, is controlling. *United States* v. *Ataka America, Inc.*, 64 CCPA 60, 65, n. 4, C.A.D. 1184, 550 F. 2d 33 (1977). Headnote 3 reads:

> 3. The term "optical instruments", as used in this part, embraces only instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

Under the foregoing definition the issue is not whether the optical element is subsidiary or dominant, but rather "the statutory distinction is between 'subsidiary' and *not* 'subsidiary'." [Italic added.] *Ataka*, 64 CCPA at 66, n. 5. It should be stressed that plaintiff does not contend in its brief that the optical elements of the Varotal 30 are subsidiary to the use of the merchandise as a lens system for a television camera, and obviously they are not subsidiary.[9]

In *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, 13, C.D. 4668 (1976), Judge Maletz observed with reference to headnote 3:

> As stated previously, the imported sights were classified under item 708.89 as other optical appliances and instruments. Also, as

[9] The optical components of the Varotal 30 are prominently depicted in schematic form in the manufacturer's promotional brochure (defendant's exhibit B).

> stated previously, headnote 3 of part 2, schedule 7 of the tariff schedules defines "optical instruments" as "instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some subsidiary purpose." *Viewed against this statutory definition, it must be concluded that if an imported article consists of one or more optical elements the purpose of which is not subsidiary with regard to the operation of that article, then it is properly classifiable as an optical instrument under the tariff schedules.* See *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, 179, C.D. 4602 (1975). See also *Librascope Div. of Singer-General Precision, Inc.* v. *United States*, 76 Cust. Ct. 197, C.D. 4656 (1976). [Italic added.]

Since the Varotal 30 incorporates one or more optical elements which are not subsidiary with regard to the operation of that article, it is properly classifiable as an optical instrument under item 708.89, TSUS.

Plaintiff argues that since the Varotal 30 is an appliance and not an instrument, the definition in headnote 3 of "opitcal *instruments*" [italic added] is inapplicable in this case, "which relieves plaintiff of the burden of establishing that the opitcal portion of the system is used for a subsidiary purpose" (reply brief, 11). This argument is specious. *Webster's New International Dictionary* (2d ed. 1950), p. 1288, cited by plaintiff, broadly defines the term "instrument", as follows: "That by means of which any work is performed or result is effected; a medium; means". Plainly, then, the Varotal 30 is an instrument within the purview of headnote 3.

I am also unable to agree with plaintiff's contention that the merchandise is more than an optical appliance or instrument "as it contains a majority of components that are unrelated to the optical element of this system" (reply brief, 11). The Varotal 30, referred to by plaintiff's witness Murphy as an optical system (R. 29) and as an optical package (R. 42), is essentially a television camera lens with a sophisticated system of electronic and mechanical controls for the iris (aperture), zoom and focus, which are all optical features of the merchandise. Inasmuch as the record shows that the major electromechanical components of the merchandise are directly related to the optical function of the lens system, the electromechanical features of the Varotal 30 do not exclude the merchandise from the definition of optical instruments in headnote 3. *Cf. Corning Glass Works* v. *United States*, 82 Cust. Ct. 249, C.D. 4807 (1979) (machine for optical inspection of ampuls with nonoptical apparatus to mechanize and pace the inspection process).

In support of its "more than" argument, plaintiff strongly emphasizes the Tally light feature of the merchandise. As indicated above, these lights signal to the performers which camera is on the air at the particular time. The testimony of record shows that this feature is

essential in television broadcasting. Nevertheless, a careful examination of the manufacturer's promotional brochures (defendant's exhibits B and C) fails to disclose any mention of the Tally light feature. The silence of the promotional brochures respecting the Tally lights is eloquent testimony as to their ancillary and subordinate status relative to the optical components of the merchandise, which are prominently depicted and described in the brochures.

The short of the matter is that, although the merchandise is more than a mounted lens within the common meaning of that term, the lens system herein meets the broader definition of optical instruments in headnote 3, and thus, falls within the purview of item 708.89, TSUS, as alternatively claimed by defendant. Since the subject merchandise is specifically provided for as an optical appliance or instrument under item 708.89, TSUS, classification as a part of a television camera under item 685.10, TSUS, is precluded by general interpretative rule 10(ij).[10] *Cf. Jensen, supra*, 77 Cust. Ct. at 21. Inasmuch as no reliquidation may be had in this case at the higher rate of duty applicable to "Other (optical) appliances and instruments" under item 703.89, TSUS, the action is dismissed without affirming the classification by the District Director. See *Sumitomo Shoji New York, Inc.* v. *United States*, 64 Cust. Ct. 299, 304, C.D. 3994 (1970).

Judgment will be entered accordingly.

(C.D. 4867)

TEXAS INSTRUMENTS INCORPORATED, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 76-2-00443

[Motion granted in part; cross-motion granted.]

(Decided August 5, 1980)

Eugene L. Stewart for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch (*Sheila N. Ziff* on the briefs), for the defendant.

RICHARDSON, Judge: In this action involving the importations of integrated circuits, silect transistors, and metal can transistors assem-

[10] Rule 10(ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but *does not prevail over a specific provision for such part*". [Italic added.]

bled in Curacao, Netherlands Antilles, by Geophysical Service Inc. and exported to the United States in 1968 and 1969, plaintiff has moved, and defendant has cross-moved, for summary judgment. In issue under the pleadings as augmented by the first amended complaint, which amendment the court hereby allows in view of the lack of opposition thereto by the defendant, is the propriety of the appraising officer's actions in (1) disallowing item 807.00 treatment for a plastic epoxy molding compound used in the assembly of some of the imported devices, (2) making certain additions to or refusing to make certain reductions against the cost of components fabricated or purchased in the States for use abroad in the assembly of the imported devices, (3) making certain additions to labor costs, general expenses, and profits, and (4) making improper value calculations in the application of the duty-free allowance.

It is conceded in the pleadings that the imported devices were produced in Curacao, Netherlands Antilles, by Geophysical Service Inc., hereinafter referred to as GSI, a wholly owned subsidiary of plaintiff who imported the devices, that during 1968 and 1969, GSI was the only producer and exporter in Curacao of merchandise of the same general class or kind as the imported devices, and that the merchandise in issue was appraised on the basis of constructed value. It is conceded by the parties that constructed value is the proper basis for determination of the value of the imported devices.

Central to a determination of the pending motions is a consideration of the circumstances which prompted the appraising officer, in the first instance, to make parallel and hence sometimes conflicting calculations of the component elements of constructed value (exhibits B and E) as against the final calculations made by plaintiff (exhibits A and D), bearing in mind the requirements of 19 U.S.C.A. 1401a(g) (sec. 402(g), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956).

The record shows that the appraising officer was possessed of no independent sources of cost information, and was entirely dependent upon plaintiff for the data with which he appraised the imported merchandise. The record also shows that plaintiff's cost submissions were initially overstated in the estimation of duties tendered with its entries out of an abundance of caution to guard against underestimation of the Government's revenues. Hence, it is a foregone conclusion that plaintiff would have had to revise its cost figures periodically because of its use of standard costs (i.e., costs for a past period) in the entry of the merchandise which varied from actual costs. This was apparently permissible in plaintiff's case under applicable customs regulations. See 19 CFR. 8.15(d)(1) (1968 ed.).

The appraising officer elected to disregard the transactions between plaintiff and its subsidiary, GSI, solely for the reason, it appears, that

the importing and exporting parties are related (exhibit B, note A). Nevertheless, the appraising officer was also of the opinion that the general expenses and profit of the exporter are "the usual in the trade" because GSI is "the only producer of this type of merchandise in the Netherlands Antilles" (exhibit E, note M).

However, because of this relationship, the appraising officer deemed it necessary to determine for himself the usual general expenses and profit percentage that was to be applied to the individual device cost of labor and fabrication in the transactions between plaintiff and GSI.

In determining the usual general expenses and profit percentage for each year (1968 and 1969), the appraising officer determined the total cost of materials, fabrication, general expenses, and profit for each year, and then divided the total of materials and fabrication into the total of general expenses and profit.

In addressing himself to data presented by plaintiff relative to GSI's booked costs, where an item of cost was deemed adequate the appraising officer accepted that amount. Where an item of cost was deemed to be deficient, he, in most instances, accepted the upward adjustment suggested by plaintiff. He objected to plaintiff's suggestion for a reduction to a lesser amount of some costs incurred by GSI. He also objected to plaintiff's suggestion for elimination of certain interdivisional and intragroup profits.

As to materials manufactured by plaintiff and sold to GSI at a loss, not only were these materials uplifted to actual cost by the appraising officer, they were also uplifted by an additional 8.11 percent to reflect the price plaintiff would have charged had GSI been an independent customer. The 8.11 percent figure represented a consolidated corporate profit experienced by plaintiff in 1968, based upon the total of all costs, which was utilized when it was determined that GSI made no profit in 1968. The appraising officer opined, "There was no overall profit made in Curacao for 1968. Because that is not normal and apparently resulted from the fact that the plant was new or was the result of some artificial cause, we agreed with the importer that we would use the corporate profit for TI (Texas Instruments Inc.) for 1968 which was 8.11 percent" (exhibit E, note L).

In determining whether or not to disregard a transaction between related parties, an appraising official must be guided by something more than mere suspicion generated by the relationship between the parties per se. See *Greb Industries, Ltd.* v. *United States*, 64 Cust. Ct. 608, 617, R.D. 11691, 308 F. Supp. 88 (1970). He must possess factual information indicative that the amount purporting to represent a particular element of value "does not fairly reflect the amount usually reflected in sales in the market under consideration of merchandise of the same general class or kind as the merchandise undergoing appraise-

ment." See 19 U.S.C.A. 1401a(g)(1); *Brown, Alcantar & Brown, Inc., et al.* v. *United States*, 69 Cust. Ct. 249, 254, A.R.D. 306, 348 F. Supp. 723 (1972). In the instant case the appraising officer possessed no such contravening facts inasmuch as he knew that GSI was the only producer of merchandise of the same general class or kind in Curacao, the market under consideration. Thus, it is clear here that the appraising officer who, in this aspect of the administrative proceeding, (at least, has the burden of persuasion), discredited the transactions between the parties while lacking the proper basis to make that judgment at the outset.

Given the facts at bar, the focal point of concern on the part of the appraising officer, as perhaps with all new export industries facing customs scrutiny, should have been the bona fides of the transactions themselves. Cf. *Ziade* v. *United States*, 14 Ct. Cust. Appls. 47, 50, T.D. 41551 (1926). On the instant motions plaintiff has made an extensive and minutely detailed showing of the cost structure underlying the imported devices. Indeed, it did as much at the administrative level over the period of time that the subject entries were before the customs officials. Of course, in reviewing the evidence the court's role is not to resolve any genuine factual issues in the case, provided that they are not material issues. *United States* v. *Sumitomo Shoji, New York, Inc.*, 63 CCPA 79, 83, C.A.D. 1169, 534 F. 2d 320 (1976).

As to plaintiff's contention that an item 807.00 allowance should be made for the epoxy compound used to encase the assembled silect transistors, it is noted that plaintiff places reliance upon *General Instrument Corporation* v. *United States*, 71 Cust. Ct. 51, C.D. 4470 (1973) for the proposition that epoxy pellets used for encapsulation purposes were within the ambit of item 807.00 (brief, p. 129). As the court reads C.D. 4470, which was decided by the writer of this opinion, the court did not so hold. In that case, which involved a claim for item 807.00 treatment for various types of diodes assembled in and exported to the States from Taiwan, the issue was whether or not encapsulation of the diodes by means of the plastic defeated the claim for allowance of item 807.00 treatment as to the diodes, and the court held that encapsulation did not defeat the importer's claim.

In C.D. 4470 the court was careful to distinguish between American products and assembled components—grouping the pellets as being one of four American products while elsewhere identifying the other products, i.e., nailhead leads, solder wafers, silver-silicon sandwich cell, as the assembled components. And it was the diodes so assembled for which the allowance in duty was ordered by the court there, not the epoxy material. Consequently, plaintiff's reliance upon C.D. 4470 is misplaced.

Under the uncontroverted facts of this case, it is clear that the pellets do not qualify for item 807.00 treatment. In the form in which they were exported the pellets were not ready for assembly. According to the record the plastic material is of the thermosetting type which must be subjected to heat in Curacao in order to flow and assume a new permanent shape upon solidification. And during this process the material undergoes a change in chemical composition. Obviously, therefore, the pellets cannot be deemed to be fabricated components within the meaning of item 807.00 at the time of their exportation from the United States. It follows, therefore, that defendant's cross-motion for summary judgment must be granted as to plaintiff's claim for item 807.00 treatment for the epoxy compound.

Moving to the appraisement aspect of the case, the court is not impressed that any genuine factual issue exists as to the nature of the transactions involving the movement of the merchandise in issue between plaintiff and GSI. There is no question but that the products comprising the imported devices were sold and not consigned to GiSI notwithstanding the nomenclature employed by counsel in discussing, the movement of the merchandise abroad and back again.

Also, the court finds no issue in the case relative to the element of profit in connection with the assembly and exportation of the merchandise at bar in 1968. The record shows that there was no profit earned by GSI in 1968. Consequently, in the absence of any evidence of inaccurate reporting the court is in agreement with plaintiff that no profit as an element per se should be included in a constructed value appraisement affecting the 1968 devices. As the court reads 19 U.S.C.A. 1401a(d)(2) (sec. 402(d)(2), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956), an addition for profit is not mandated where none was in fact experienced at the level which serves as criteria for ascertainment of this element of constructed value—in this case, GSI, by reason of its status as the sole producer in the market under consideration. See *United States* v. *Henry Maier*, 21 CCPA 41, 50, T.D. 46378 (1933). Any other view of the matter would result in the creation of an element of value as arbitrary as that existing under the old law formula of cost of production which Congress endeavored to move away from in the enactment of the new law formula of constructed value in its pursuit of commercial reality. See Senate Report No. 2560 on H.R. 6040, 84th Congress, 2d session, p. 3 (1956). Therefore, in the court's view the appraising officer erroneously calculated an element of profit in his return for the 1968 devices.

This is not to say, however, that profit does not enter into the ascertainment of constructed value for the 1968 devices. On the contrary, it does, if only in connection with the ascertainment of other elements of constructed value for these particular devices,

namely materials and fabrication costs. This is simply because the criteria for ascertainment of costs of materials and fabrication, as particular elements of value, are not restricted as to location. Consequently, the resourcefulness of the appraising officer in reaching all aspects of cost, inclusive of intercorporate and intracompany profit, with respect to the elements of materials and fabrication as to the imported devices including the 1968 importations finds support in the statute, i.e., 19 U.S.C.A. 1401a(d)(1) (sec. 402(d)(1), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956), and judicial precedents to which attention is called by defendant, and, therefore, must be upheld irrespective of whether such costs originate onshore in the United States or offshore in the country of exportation.

The same cannot be said with respect to the elements of general expenses and profit. In fact, it is in connection with the ascertainment of general expenses and profit that appraisement of merchandise under the residual new law formula witnesses its most radical departure from the old law standard, in the court's opinion. Under the new law no longer is the ascertainment of general expenses limitless as to place (i.e., the usual general expenses) as was the case under the old formula. Now, under the new law Congress, by linking the ascertainment of the element of general expenses with the ascertainment of the element of profit which, under the old law was limited as to place, has revealed an intention to limit the ascertainment of these two elements of a constructed value determination to offshore cost considerations. Such limitation is expressed in the statutory language, "in sales * * * in the country of exportation * * * for shipment to the United States," appearing in section 1401a(d)(2) which, of course, qualifies as to place the calculation of the elements of general expenses and profit. Cf. *Kaysons International, Ltd.* v. *United States*, 66 Cust. Ct. 560, 566, R.D. 11741 (1971).

The place limitation, of course, impacts the appraisement of the imported devices insofar as concerns the elements of general expenses and profit in view of the appraising officer's inability to employ the broader methodology such as he would be able to do if he could properly disregard the transactions at bar. A constructed value appraisement under the new statutory formula provides its own criteria for self-fulfillment. It does not permit the appraiser to go outside the guidelines in the statute.

A principal offender here is the item of corporate support expenses calculated under the heading of general and administrative expenses. The appraising officer took the position that "It is traditional and statutorily correct to include all items of expense whether they were necessary or not. They were incurred and they are an actual expense" (exhibit B, note G). Thus, the appraising officer makes no pretense

about the fact that the item of corporate support is neither offshore oriented nor involved in the production of the imported devices.

The case of *United States* v. *Cavalier Shipping Co., Inc., et al.*, 56 CCPA 117, C.A.D. 965, 412 F. 2d 245 (1969), to which defendant calls attention, supports the rejection of this item from the general expenses category because the item involved there (royalty) was incurred in the manufacture of the debarking machines offshore, and, as such, was found to be an item properly included in the cost of production and constructed value appraisements.

Likewise affected is the appraising officer's rejection of certain adjustments proposed by plaintiff under the headings of factory overhead, general expenses portion of startup costs, and other general and administrative expenses. Adjustment of these items as proposed was rejected because the proposed adjustments reflected only offshore cost considerations and not both onshore and offshore costs which were implicit in the markups and assists returned in the appraisements. In one instance, however, it is noted that the appraising officer did accept the adjustment figures proposed by plaintiff in connection with the 1969 costs for transferred administrative supplies, i.e., variance ($13,603), handling ($762), and freight ($1,855). And the appraising officer's reason for differentiating between the proposed adjustments here is lost on the court unless such action be associated with his calculation of the rate of profit (as an element of value) applicable to the 1969 devices. This rate too, like the proposed adjustments, is predicated upon offshore cost considerations.

The rationale underlying the ascertainment of the rate of profit applicable to the 1969 devices is that

> (s)ince GSI was the only manufacturer/assembler of semiconductor devices in Curacao in 1969, its experienced profit, not TI's, was the usual profit. In sum, the appraising officer was correct in utilizing GSI's own profit rate in appraising the merchandise (defendant's brief, pp. 18–19).

The court agrees with this rationale. And the only fault which can be found with the appraisements here is that the same rationale should have been applied in connection with ascertainment of the element of general expenses inasmuch as both elements are paired under the same qualifying phrases in the statute.

With respect to value calculations applicable to both the 1968 and 1969 devices, the court is of the opinion that other than the place limitation affecting ascertainment of the elements of general expenses and profit in a constructed value determination as noted, there is no warrant in the statute for applying the profit rate so calculated against only Curacao based materials, labor, and assists as contended for under plaintiff's alternate claim. Unlike the situation in *Control*

Data Corporation v. *United States*, 61 CCPA 109, C.A.D. 1132 (1974), which is relied upon by plaintiff, the materials, etc., at bar were not consigned to GSI, the assembler. They were sold to the assembler. And there is no showing in the record that any item was furnished without cost to or a charge against the assembler.

For the reasons stated plaintiff's motion for summary judgment is granted as to its claim against calculation of an element of profit applicable to the 1968 importations, and as to its claim against inclusion of onshore cost considerations in the calculation of the element of general expenses applicable to the importations. And, in the interest of minimizing mathematical error, the parties are hereby directed to submit to the court proposed findings of fact and conclusions of law resulting from the conclusions reached herein insofar as they affect the appraised unit values for each device type imported as shown in paragraph 247 of plaintiff's statement of material facts.

The foregoing constitutes the decision and orders of the court.

(C.D. 4868)

ARNOLD PICKLE & OLIVE CO., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 73-7-01647

Packing cost

[Judgment for plaintiff.]

(Decided August 13, 1980)

Glad, Tuttle & White (*Robert Glenn White* on the memorandum) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Sidney N. Weiss* at the trial and *Susan Handler-Menahem* on the memorandum), for the defendant.

WATSON, Judge: The trial in this case was limited to the question of the costs of packing certain cucumbers for shipment to the United States in 1971. Plaintiff had previously been granted a partial summary judgment as to the export value of the cucumbers, exclusive of the packing costs. *Arnold Pickle & Olive Co.* v. *United States*, 79 Cust. Ct. 50, C.D. 4712, 435 F. Supp. 921 (1977).

The court is satisfied that plaintiff has proven the packing costs by a preponderance of the evidence. The minor flaws emphasized by defendant are tolerable imperfections and not failures of proof. The testimony of two of the owners of plaintiff, the accountant for Pickle Mex, and the supervisor of the packing was sufficient to prove the costs of labor, supervision, salt, ice, grading machinery and scales, as well as the free availability of well water.

The court adopts the reasonable period of 8 years for depreciation of the weighing scale and, rejecting the calculations based on the partial use of volunteer labor, considers all packing to have been done by paid workers. As a result, the court finds the cost of packing for each truckload entry to be $43.56210 plus, for those entries in which ice was used, the cost of ice set out in plaintiff's exhibit No. 17.

Judgment will be entered accordingly.

(C.D. 4869)

EVVAN IMPORTERS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Stabilized Turquoise

Court No. 78-2-00309

SEMIPRECIOUS STONE—STABILIZED TURQUOISE

Low-grade, porous turquoise whose pores were filled with clear plastic remained a semiprecious stone within the meaning of the tariff schedules. The process of stabilization did not make the stones "more than" or "other than" turquoise and did not change them into a manufactured product.

[Judgment for plaintiff.]

(Decided August 13, 1980)

Samuel W. Gilman, for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell*, trial attorney), for the defendant.

WATSON, Judge: This action raises the question of whether stabilized turquoise is a semiprecious stone. The stabilized turquoise involved was low-grade, porous turquoise, mined in Arizona. It was stabilized by a vacuum process in which its pores were filled with clear plastic. This decreased its tendency to crumble when cut and also gave it a somewhat darker or "wetter" appearance. After stabilization the turquoise was sent to Israel for cutting and polishing.

Upon importation, it was then classified as parts of jewelry under item 740.38 of the Tariff Schedules of the United States (henceforth TSUS) and assessed with duty at the rate of 27½ percent ad valorem. Plaintiff claims that it should be classified as semiprecious stones under item 520.39 of the TSUS and should therefore be assessed with duty at the rate of 2½ percent ad valorem.

Defendant takes the view that the addition of plastic makes the importation "more than" or "other than" a semiprecious stone and that it is not considered a semiprecious stone in the trade and commerce

of the United States. Defendant's expert witness opined that the application of foreign substances to turquoise made it "unnatural" and that stabilization by impregnation with plastic made it a manufactured product. Defendant referred to the State laws of those States in which turquoise is an important component of native American jewelry and stressed that those laws consider stabilized turquoise as "unnatural."

Plaintiff's expert witness testified that stabilization did not change the basic characteristics of the turquoise stones or their identity as semiprecious stones and was consistent with accepted traditional methods of treating turquoise such as waxing and oiling. Plaintiff also relied on R. Shipley's *Dictionary of Gems and Gemmology* (6th ed.) which stated that "plastic, paraffin, wax, oil, and other substances are often impregnated in turquoise to improve its color." In addition, plaintiff referred to R. Webster's *Gems and Their Sources, Descriptions and Identification*, which states as follows at page 218:

> Specimens of turquoise are sometimes oiled or waxed and are considered commercially acceptable and presumably the method of hardening the soft friable American turquoise by impregnating with colloidal silica is also acceptable.

The court is of the opinion that plaintiff's position is correct as a matter of law and that there is an acceptable range of treatment to which a stone can be subjected without changing its basic identity. In the court's view the guiding principle in this case is that a tariff description by name describes all forms of the named article. *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935); *T. M. Duche & Sons, Inc., et al.* v. *United States*, 44 CCPA 60, C.A.D. 638 (1957). The use of a foreign substance to strengthen the stone's porous structure is in the nature of a preservation of its essential characteristics and an aid to its use in a conventional manner. To the extent that the stabilization improves its surface color it is a minor enhancement. In neither respect does stabilization transform or manufacture the stone into something else. A distinction must be made between State laws defining turquoise for the purpose of maintaining the integrity of arts and crafts and tariff laws naming "semiprecious stones" as a category of articles of general commerce. The tariff laws must be read more broadly because they are meant to classify articles in a more diversified context. That is to say, they must take into account the endless variations or modifications to which named articles are reasonably subject. They are not designed to protect or preserve one ideal or traditional form at the expense of another.

To call the importations "more than" turquoise is mistaken. The case law concept of "more than" does not mean that more than one substance is present in an object. It means that from the standpoint of functional

analysis the object is a combination not adequately described by a particular tariff term. For example, the term "motor" may not include articles which consist of motors and gears or motors and clutches. See *United States* v. *A. W. Fenton Co., Inc.*, 49 CCPA 45, C.A.D. 794 (1962); *United States* v. *Acec Electric Corp.*, 60 CCPA 113, C.A.D. 1091, 474 F. 2d 1009 (1973). Here the impregnated plastic has no divergent functional aspect. In fact, it simply aids in the single normal use of the stone. Its presence, therefore, does not make the stone more than a stone in a functional sense.

If we turn to consider the stone strictly as a mineral substance then the consequence of the insertion of the foreign material is more easily discussed. It would be incorrect to draw an analogy to those cases in which partial ingredients played an important role in the classification of chemical mixtures. See for example, *United States* v. *Aceto Chemical Co., Inc.* 64 CCPA 78, C.A.D. 1186, 553 F. 2d 685 (1977); *United States* v. *Cavalier Shipping Co., Inc.*, 60 CCPA 152, C.A.D. 1103, 478 F. 2d 1256 (1973). In those cases the partial or minute ingredients were themselves described in the tariff schedules and hence their ability to force the remaining ingredients out of the provision where they would normally fit had to be closely considered. Here the defendant would have the classification of the dominant material defeated by an "ingredient" which is not described in the tariff schedules and has no comparable special claim to importance.

In the court's opinion the best analogy is offered by those cases in which modifications of basic objects or articles did not remove them from eo nomine descriptions. Thus, in *National Lead Co.* v. *United States*, 51 Cust. Ct. 13, C.D. 2407 (1963), the use of cement to make briquettes out of antimony ore did not remove the importation from classification as antimony ore. Nor did the binding together of ground wood charcoal with starch, remove an importation from classification as wood charcoal. *Britton & Co.* v. *United States*, 41 Cust. Ct. 64, C.D. 2021 (1958). In the same manner the treatment of cedar fence posts with pigmented wood preservative did not convert them from posts to lumber. *Arthur J. Humphreys, Inc.* v. *United States*, 74 Cust. Ct. 73, C.D. 4588, 394 F. Supp. 1395 (1975), *aff'd*, 63 CCPA 75, C.A.D. 1168 (1976). When, in addition to these analogous situations, it is considered that respected, published authorities in the field of gemmology indicate that impregnation of turquoise with substances intended to harden it and improve its color is a recognized practice, the court's legal conclusion is reinforced by the realities of the trade.

The court concludes that stabilized turquoise remains turquoise, is a semiprecious stone within the meaning of that term, and is properly described as such in item 520.39 of the TSUS.

Judgment will enter accordingly.

(C.D. 4870)

WAY DISTRIBUTORS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Sheets of Rubber

Consolidated Court No. 73–4–00943

EXPANDED RUBBER

Rubber which had been expanded by means of a blowing agent was properly classified as expanded rubber even though the signs of expansion were not visible to the naked eye.

INTERPRETATIVE RULE—ADMINISTRATIVE PROCEDURE ACT

A ruling by the Customs Service that defined expanded rubber in terms of the detection of signs of expansion under a magnification of 30 diameters was an interpretative rule, exempt from the notice and comment requirements of 5 U.S.C. 553.

AMERICAN MANUFACTURERS PROTEST

Section 516 of the Tariff Act of 1930 is not the exclusive method by which an American manufacturer may seek to bring about a change in the classification of imported merchandise.

[Judgment for defendant.]

(Decided August 13, 1980)

Doherty and Melahn (*William E. Melahn* and *Robert Emmet Mullin, Jr.*, on the memorandum) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Jerry P. Wiskin* on the memorandum), for the defendant.

Murray Sklaroff, amicus curiae.

Lamb & Lerch (*David R. Ostheimer* and *Sidney H. Kuflik* on the memorandum), *amicus curiae.*

WATSON, Judge: This consolidated action challenges the classification of sheets of rubber used for making shoe soles. The imported products are known by the trade names of Bovinide, Polyflex, Superlite, and Norazell. Bovinide will be used here to refer to all of them. The products were exported from West Germany and entered at the Port of Boston in 1972 and 1974.

The imported sheets were classified as expanded rubber under item 770.80 of the Tariff Schedules of the United States and assessed with duty at the rate of 12.5 percent ad valorem. Plaintiff claims that these sheets should be classified as rubber sheets under item 771.42, dutiable at the rate of 6 percent ad valorem, or, alternatively, as rubber articles not specially provided for under item 774.60, dutiable at the rate of 8.5 percent ad valorem.

Plaintiff also claims that ORR Ruling 202–71, upon which the disputed classification was based, was promulgated in violation of the rulemaking provision of the Administrative Procedure Act, 5 U.S.C. 553. Plaintiff further claims that ORR Ruling 202–71 was

issued in violation of section 516 of the Tariff Act of 1930, of which more anon.

The crux of plaintiff's classification claim is the argument that the importations are not expanded rubber, yet the evidence shows that they are expanded by means of a blowing agent albeit to a lesser degree than other expanded rubber. Plaintiff tried to prove that the lesser degree of expansion made them something other than expanded rubber, something assertedly known commercially as semiexpanded, microcellular or semicomparted rubber. However, plaintiff failed to persuade the court that the importation represents a distinctly named commercial product.

The distinctions drawn by plaintiff are entirely matters of gradation in an article with the same general characteristics and uses, i.e., expanded rubber used for shoe soles. Plaintiff failed to prove that use of magnification to detect the regular cellular construction (which is the visual evidence of expansion) was improper or indicates a product distinct for tariff purposes from one whose structural character can be determined with the naked eye.

Apart from its definitional argument plaintiff attacked the classification on procedural grounds. The underlying ORR Ruling 202–71, which set the standard of microscopic enlargement of 30 diameters for the detection of expanded rubber, was composed as a response to a letter written to the Commissioner of Customs by counsel for the Heel and Sole Division of the Rubber Manufacturers Association, Inc. That letter of June 3, 1970, expressed concern with the classification of imported synthetic rubber shoe-soling material and argued that the importations were expanded by the introduction of a blowing agent and were being imported at lower rates of duty than those applicable to expanded synthetic rubber.

According to plaintiff, ORR Ruling 202–71 was a "rule" and the process by which it was composed was "rulemaking," all within the Administrative Procedure Act, 5 U.S.C. 551(4).

As a consequence, plaintiff asserts that ORR Ruling 202–71 is invalid because it was issued without conformity to the requirements of the Administrative Procedure Act, namely, without public notice of the proposed rule in the Federal Register under 5 U.S.C. 553(b) and without affording interested persons an opportunity to participate in the rulemaking under 5 U.S.C. 553(c). Although the defendant does not dispute the general applicability of the terms of the Administrative Procedure Act, it does argue that ORR Ruling 202–71 is an "interpretative rule" which is specifically excepted from the notice and participation requirements by 5 U.S.C. 553(b)A. Defendant's point is well taken. In essence, ORR Ruling 202–71 is the agency's statement of its understanding of the meaning of a specific tariff description.

It is an administrative construction of language which is eventually subject to judicial construction and falls squarely within the meaning of interpretation.

This ruling is a typical interpretative rule in that it defines the agency's understanding of the statutory term "expanded rubber." See K. Davis, "Administrative Law Treatise" section 503 at 300–304 (1958). Plaintiff argues that the ruling had a "substantial impact," in that it led to a doubling of its duty payments. It thus seeks to align itself with cases which measure the "impact" of a rule to determine whether procedural safeguards should be utilized for the making of a rule which might normally be exempt from section 553 notice and comment requirements. See for example, *Pharmaceutical Manufacturers Assn.* v. *Finch*, 307 F. Supp. 858 (D. Del. 1970). However, the court has found no example of the impact test in use for a rule which is unambiguously interpretative and, in addition, no reason to apply it here. Interpretative rules of a strictly definitional nature may have a far greater impact than a definition of expanded "rubber" and still be excluded from the requirements of section 553. See *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F. 2d 1278 (D.C. Cir. 1974). The impact test appears to be a useful device for arriving at the procedures of rulemaking when the rule does not fit easily into one of the section 553 exemptions or, conceivably, as a measure of when common law concepts of elementary fairness are called into play. In any event, the impact should be a drastic one, in which vital interests are affected before the court steps beyond the terms of section 553. See K. Davis, "Administrative Law of the Seventies" section 6.01–7 (1976). The effect of the ruling under consideration is a normal effect of rulings interpreting tariff language and no exceptional factors distinguish it from other rulings. To attribute "substantial impact" to every ordinary, adverse interpretative ruling would be absurd. Nothing would be left of the necessary exception of interpretative rules from the notice and comment requirements. See K. Davis, "Administrative Law Treatise" section 6.30 at 595 (2d ed. 1978).

Additional arguments by plaintiff were without merit. The fact that this ruling may have reversed a prior ruling is of no consequence. In either event it is an exempt interpretative rule. In making this rule the agency was not required to consult plaintiff nor was it required to avoid communication with those advocating an interpretation adverse to plaintiff. Interested parties may communicate their views to the agency at any time and in any manner not inconsistent with statute or law. The existence of section 516 of the Tariff Act of 1930, which allows an American manufacturer to complain and seek to change the classification of imported merchandise does not mean that section 516 is the only permissible way for American manufacturers

to attempt to bring about a change in import classification. Such a restrictive view finds no support in law or legislative history.

For the reasons expressed above the court finds that the classification was substantively and procedurally correct and judgment will enter accordingly.

(C.D. 4871)

BROWNING METALS CORP., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Coated wire

Court No. 79–8–01340

Wire coated with a plastic material to protect it from the stress of manufacture into springs was properly classified as round wire of alloy steel under item 609.45 of the TSUS rather than under the claimed provision for covered wire of item 642.97. Headnote 1 to part 1 of schedule 6, the part in which the wire was classified, specifically announces the coverage of that part over wire coated for protective purposes.

[Judgment for defendant.]

(Decided August 15, 1980)

Mandel & Grunfeld (*Steven P. Florsheim* on the memorandum) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan C. Cassell* on the memorandum), for the defendant.

WATSON, Judge: This dispute involves imported stainless steel wire coated with a plastic substance intended to act as a lubricant in the manufacture of the wire into helical springs. The wire was classified as round wire of alloy steel under item 609.45 of the Tariff Schedules of the United States (TSUS) and assessed with duty accordingly.[1]

Plaintiff claims classification as other wire covered with nonmetallic material under item 642.97 of the TSUS, dutiable at the rate of 8.5 percent ad valorem. Although the claim has some literal plausibility it quickly founders on a crucial headnote relating to the item under which the wire was classified. Headnote 1 to part 2 of schedule 6 states the provisions of part 2 apply to products "whether or not (they) have been subjected to treatments to improve the properties or appearance of the metals or to protect them against rusting, corrosion or other deterioration." The headnote goes on to list a wide variety of treatment including "coating with enamel, paint, lacquer, or other nonmetallic substances * * *." Plaintiff argues for a fine distinction between coatings which protect against the ravages of

[1] 10.5 percent ad valorem plus 0.75 cent per pound on the chromium content in excess of 0.2 percent pursuant to item 607.01 of the TSUS, as prescribed by headnote 4, subpart B, part 2, schedule 6.

nature and those which protect against the stresses of manufacture. However, the court does not read this subtle distinction in the headnote and considers it an artificial and strained reading. The simpler and more realistic approach is that the headnote intends to speak of all coatings of a protective nature. It follows that wire coated to protect it from the stresses of manufacture remains correctly classifiable in part 2 of schedule 6 under item 609.45.

The part 3 provision claimed by plaintiff for other wire covered with nonmetallic material must obviously be construed in harmony with the wire provisions of part 2. The headnote under discussion takes care to specifically exclude the items named in the claimed provision from part 2 of schedule 6. But plaintiff has failed to demonstrate why the claimed provision for covered wire would be a more accurate classification of the imported wire. No special or peculiar commercial meaning has been proven which would remove the coated wire from the provision in which it was classified. Obviously, in an abstract and literal sense all coated wire is covered. But such classification for the imported wire would make headnote 1 of part 2 entirely meaningless. For the moment it suffices to say that the wire covered with nonmetallic material of item 642.97 is wire other than that which is coated within the meaning of headnote 1. The implications of specific types or methods of "coating" or "covering" wire will have to be examined in this context as they arise.

For the reasons expressed above, plaintiff's claim must be rejected and judgment issued for the defendant.

(C.D. 4872)

F. W. MYERS & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 72-5-01183

Iron Powder (Atomet 28 plus additives)

SPONGE IRON POWDER—BLENDED POWDERS—POROSITY UNAFFECTED

Atomet 28 iron powder to which small amounts of a lubricant, graphite, and copper are added in varying combinations in the manufacturing process prior to exportation from Canada, *Held*, classifiable upon importation into the United States as claimed under TSUS item 608.02 as sponge iron powder where the record shows that the additives are introduced into the dominant iron powder only to improve existing properties in the iron, do not affect the porosity of the Atomet 28 particles, and such blending is common practice in preparation for conventional powder metallurgical application and compatible with the legislative history of the tariff provisions for sponge iron as well as with pro-

visions in the TSUS permitting treatment of metals to improve their properties.

[Judgment for plaintiff.]

(Decided September 11, 1980)

Arter Hadden & Hemmendinger (*Barry E. Cohen* at the trial and on the brief); *Covington & Burling* (*Lyn Marie Schlitt* at the trial; *Harvey M. Applebaum* and *Lyn Marie Schlitt* on the brief); *Patrick H. Bowen*, Assistant General Counsel, Kennecott Copper Corporation, of counsel; for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Robert H. White* at the trial and on the brief), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of five iron powders imported from Canada in 1971 or 1973 and known commercially as Atomet 2810, 2815, 2827, 2831, and 2835.[1] Upon entry into the United States they were classified in liquidation under TSUS item 608.05 as modified by T.D. 68–9 as other powders other than alloy iron or steel at the duty rate of 0.3 cent per pound. And plaintiff claims that the powders should have been classified in liquidation under TSUS item 608.02 as modified by T.D. 68–9 as sponge iron powder not containing chromium in excess of 0.2 percent, molybdenum in excess of 0.1 percent, tungsten in excess of 0.3 percent, and vanadium in excess of 0.1 percent [see headnote 4, subpart B, part 2, schedule 6, TSUS] at the duty rate of 12 cents per ton for the 1971 entry, and free of duty for the 1973 entries.

The base powder, Atomet 28, has heretofore been adjudged by this court to be classifiable as a sponge iron powder under item 608.02 in *F. W. Myers & Co., Inc.* v. *United States*, 76 Cust. Ct. 51, C.D. 4635 (1976), the record of which has been incorporated into the record in this case. And the suffixes 10, 15, 27, 31, and 35, which are added to the Atomet 28 designation in the importations at bar, are indicative of various *additives* to the base powder itself. Thus, the primary question before the court is whether these *additives*, consisting of small amounts of (1) a lubricant [either acrawax "C," zinc stearate, or stearic acid], as in Atomet 2827, or (2) a lubricant plus graphite, as in Atomet 2810 and 2815, or (3) a lubricant, graphite, and copper, as in Atomet 2831, or (4) a lubricant and copper, as in Atomet 2835, remove the powders from item 608.02 classification as sponge iron powder. In all cases, the base powder [Atomet 28 iron] content by weight ranges from a low of 96.6 percent as in Atomet 2831 to a high of 99.01 percent as in Atomet 2827.

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[1] The powders were produced by Quebec Metal Powders, Ltd., the Canadian manufacturer and real party in interest.

In opposing classification of the subject merchandise as sponge iron powders, defendant places much reliance upon a so-called industry-wide usage of the term "pre-mix" to denote a cleavage between the imported powders which it regards as being "pre-mixes" and the *unmixed* powder which it regards as constituting the premier condition for a sponge iron powder. However, testimony adduced from industry witnesses called by defendant on the matter are not determinative in the court's view. While an attempt has been made to regulate nomenclature and standardize terminology in the powder metallurgy industry subsequent to the adoption of the TSUS, uniformity has not been achieved in the industry with respect to usage of the term "pre-mix". In fact, it was brought out in the testimony of one of defendant's witnesses that the term "pre-mix" which, at best, is voluntary and unbinding, has on occasion been disregarded by the witness' own company.

Of greater significance is testimonial evidence in the record relative to powder porosity and industry practice in regard to additives. Testimony indicates that porosity is unaffected by the presence of additives. Dr. Joseph Capus, Quebec Metal Powders' technical director, testified that *blending* does not change the porosity of the powder because the additives mixed in the blend are only mixed physically, and there is no reaction between the iron and the additives in that state. And this testimony was corroborated by the testimony of George Abbott, who, at one time was general manager of A. O. Smith-Inland, a former domestic iron powder producer, as well as by customs laboratory reports of physical and chemical analyses of two of the blends in issue which conclude that the powders have the appearance of a sponge iron powder.

Additionally, witnesses from both the domestic industry and the Canadian industry agreed that unblended sponge iron powder alone cannot be used in conventional powder metallurgy; that at least a lubricant must be added to the powder. And they confirmed that blends of sponge iron powder with copper, graphite (carbon), and lubricants are very common in the industry. According to the witnesses Capus and Abbott, these additives introduce no new properties to the iron but only enhance or improve existing properties such as hardness, strength, or machineability in the final sintered product.

Defendant suggests that the only additives which can be identified with sponge iron powder for classification purposes are those provided for in headnote 4, subpart B, part 2, of TSUS Schedule 6, namely, chromium, molybdenum, tungsten, and vanadium. However, the court does not find the reference in headnote 4 to these elements to constitute a *limitation* on the permissible additives to sponge iron powder classifiable under the superior heading "Sponge iron; iron or

steel powders". Headnote 4 is common to three other superior headings in subpart B, including the iron and steel products provision to which attention is drawn by defendant under point B of its brief at page 33.

It is to be noted that under headnote 2(g) steel is defined as "an alloy of iron and carbon which is malleable as first cast." And, immediately following this definition the headnote states, "*Steel may contain other elements intended to enhance one or more properties* and may contain elements unavoidably retained from raw materials, but iron must predominate, by weight, over each of the other elements." [Italic added.] Hence, if the elements referred to in headnote 4 were written into subpart B as a limitation on the presence of elements in iron, the definition of steel as set forth in headnote 2, supra, would be frustrated.

Essentially the same conclusion was reached by the court in *John V. Carr & Sons, Inc.* v. *United States*, 50 Cust. Ct. 29, C.D. 2384 (1963), in connection with a construction of the predecessor provision for sponge iron in paragraph 301 of the 1930 Tariff Act as modified by the Annecy and Torquay protocols to the General Agreement on Tariffs and Trade (GATT). In *Carr*, the Customs Court held "Sponge Iron Powder MP.52" to be properly classifiable under the provision for sponge iron in paragraph 301 as against the Government's contention that the addition of fractional percentages of nickel and molybdenum in the production of the sponge iron cake altered the physical characteristics of the iron, resulting in the production of an alloy iron powder, or an alloy steel. The court said (p. 35):

> * * * the presence of nickel and molybdenum in the commodity results in producing a substance which is commercially used as a hardening additive in the production of automotive parts.

The court further stated (p. 36):

> Molybdenum is an element which gives strength and vitality to sponge iron, thereby adding to its usefulness in the fabrication of engineering parts.

Chromium, molybdenum, tungsten, and vanadium are not *impurities* in sponge iron powder. They are identified in the TSUS as alloying elements (headnote 2(h), subpart B, schedule 6, TSUS). And the court is of the opinion that the reference to these elements in headnote 4 only reflects a tolerance for their presence in the host metal in terms of dutiability without necessarily affecting the classification of the metal itself. See and compare, *United States* v. *Gulf Oil Corporation*, 47 CCPA 32, 40, C.A.D. 725 (1959).

Moreover, with the shift in emphasis in the TSUS metal schedule to weight of metal as the basis for classification and away from the metal in chief value basis of the 1930 and prior tariff acts in conformity

to commercial practice, such concerns as additive costs and admixture of elemental materials, whether metallic or nonmetallic, appear to no longer possess the significance they previously had in influencing classification, and have virtually become casualties of the metamorphosis. See "*Tariff Classification Study, Schedule 6*," pages 86 and 88. Certainly, the framers of the TSUS left no doubt that this change in emphasis, initiated with respect to the alloy provisions, carried over into the revision of the metal schedule in general. See id., pages 687–688, remarks of Russell N. Shewmaker, Assistant General Counsel to the Tariff Commission. Thus, in the absence of specific tariff language to the contrary, the mixing or blending of materials, metallic or nonmetallic, with a host metal in conformity to standard powder metallurgical practice is to be regarded as subjecting the dominant metal to treatment to improve its properties, but not removing it from classification under the tariff provision which describes it. See headnote 1, part 2, schedule 6, TSUS. And no such inhibiting language appears in either the superior heading to item 608.02 or in the subpart B headnotes preceding item 608.02.

As to item 608.05 under which the imported powders were classified, legislative history indicates that it was not intended as a basket or residual provision (precisely the kind of thing the framers of the TSUS were striving to eliminate). Item 608.05 (unalloyed powders) was substituted for proposed item 608.06 (other powders not mixed with other metal powders) which was derived from paragraphs 5 and 335 of the 1930 Tariff Act, i.e., chemical metal and sand of iron or steel, respectively. See "Tariff Classification Study, Schedule 6," pages 47 and 92; "Tariff Classification Study, First Supplemental Report," pages 150–151.

The most significant thing about this change is the dropping of the language "not mixed with other metal powders" in proposed item 608.06 without a corresponding expansion of the definition of alloy in part 2, headnote 2, of TSUS Schedule 6 to include simple mixtures of metal powders while implying as much in language describing sponge iron powders in items 608.02 and 608.04 which remained intact. See "Tariff Classification Study, Schedule 6," pages 32 and 47. In this manner the draftsmen avoided any possible confusion between powders in which mixtures of metal powders were implicit (sponge iron powders) and those in which such mixtures were not contemplated (chemical metal and sand of iron or steel). This, then constitutes but an additional indication that sponge iron powders were never intended to be classified under item 608.05.

For the reasons stated, the court agrees with plaintiff that the record in this case does not provide a basis for any legal or factual justification for distinguishing between the blended powders in issue

and unblended sponge iron powder such as that the subject of C.D. 4635 for classification purposes. Accordingly, the court finds the powders in issue to be sponge iron powders within the meaning of item 608.02, and so holds.

Judgment will be entered herein accordingly.

(C.D. 4873)

CARLINGSWITCH, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

On Defendant's Motion To Dismiss or in the Alternative for Summary Judgment and on Plaintiff's Cross-Motion for Summary Judgment

Court No. 79-12-01947

[Defendant's motion for summary judgment granted; plaintiff's cross-motion for summary judgment denied.]

(Decided September 18, 1980)

Shaw and Stedina (*Charles P. Deem* on the memorandum) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Jerry P. Wiskin* on the memorandum) for the defendant.

MALETZ, Judge: Plaintiff voluntarily tendered $91,992.35 to Customs in connection with a penalty investigation under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592) for understating the value of certain shipments of switches, indicator lights, and related products. Subsequently, Customs refused to refund the moneys thus tendered. Plaintiff then brought this action to obtain recovery.

Defendant has moved to dismiss the action or alternatively for summary judgment on the ground that Customs' refusal to refund the moneys tendered does not constitute an "exaction" within the meaning of section 514(a)(3) of the Tariff Act of 1930, as amended (19 U.S.C. 1514(a)(3))[1] and that the court therefore lacks jurisdiction.

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[1] 19 U.S.C. 1514 reads in part:

(a) Except as provided in section 1501 of this title (relating to voluntary reliquidations), section 1516 of this title (relating to petitions by American manufacturers, producers, and wholesalers), section 1520 of this title (relating to refunds and errors), and section 1521 of this title (relating to reliquidations on account of fraud), decisions of the appropriate Customs officer, including the legality of all orders and findings entering into the same, as to—

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

* * * * * * * *

shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the U.S. Customs Court in accordance with section 2632 of title 28 within the time prescribed by section 2631 of that title.

Also relevant is 28 U.S.C. 1582 which delineates the jurisdiction of the court and provides in part:

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate Customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury, * * *.

Plaintiff, on the other hand, contends that by virtue of sections 520(a)(3) of the Tariff Act of 1930, as amended (19 U.S.C. 1520(a)(3))[2] and 514(a)(3), Customs' refusal to refund the additional duties thus voluntarily tendered amounts to an "exaction" within the meaning of section 514(a)(3); that the court therefore has jurisdiction; and that plaintiff is entitled to summary judgment on its cross-motion.

For the reasons that follow, the court concludes that the court lacks jurisdiction and therefore dismisses the action.

The facts giving rise to the controversy are undisputed. They are as follows; During the period from July 9, 1970, to January 29, 1974, plaintiff imported switches, indicator lights, and other related materials which were assembled in Mexico from U.S. products. The merchandise was entered as assembled articles under item 807.00 of the Tariff Schedules of the United States (TSUS).[3]

Valuation of assembled articles under item 807.00 is usually on the basis of constructed value or cost of production (19 CFR 10.18). Thus, where an entry is made under item 807.00, cost data for the assembled article and its U.S. components must be furnished for valuation purposes. If upon entry the costs are estimated by the importer, after entry such estimated costs must be updated and the *actual* costs furnished as soon as possible (19 CFR 10.21). With these considerations in mind, on November 27, 1973, plaintiff sub-

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[2] 19 U.S.C. 1520(a)(3) provides in part:

(a) The Secretary of the Treasury is authorized to refund duties or other receipts in the following cases:

* * * * * * * *

(3) *Fines, penalties, and forfeitures.*—Whenever money has been deposited in the Treasury on account of a fine, penalty, or forfeiture which did not accrue, or which is finally determined to have accrued in an amount less than that so deposited, or which is mitigated to an amount less than that so deposited or is remitted.

[3] The pertinent provisions of schedule 8, part 1, subpart B of TSUS pertaining to assembled articles read as follows:

Subpart B headnotes:

* * * * * * * *

3. *Articles assembled abroad with components produced in the United States.*—The following provisions apply only to item 807.00:

(a) The value of the products of the United States assembled into the imported article shall be—

(i) the cost of such products at the time of the last purchase; or

(ii) if no charge is made, the value of such products at the time of the shipment for exportation, as set out in the invoice and entry papers; except that, if the appraiser concludes that the amount so set out does not represent a reasonable cost or value, then the value of such products shall be determined in accordance with section 402 or 402a of this Act.

(b) The duty on the imported article shall be at the rate which would apply to the imported article itself, as an entirety without constructive separation of its components, in its condition as imported if it were not within the purview of this subpart. If the imported article is subject to a specific or compound rate of duty, the total duties shall be reduced in such proportion as the cost or value of such products of the United States bears to the full value of the imported article.

* * * * * * * *

807.00	Articles assembled abroad in whole or in part of products of the United States which were exported for such purpose and which have not been advanced in value or improved in condition abroad by any means other than by the act of assembly.....	A duty upon the full value of the imported article, less the cost or value of such products of the United States (see headnote 3 of this subpart).

mitted actual cost sheets to the Customs Service. The Regulatory Audit Unit of Customs reviewed these cost sheets and concluded on January 17, 1974, that the unit values on the invoices at the time of entry were understated. Shortly thereafter, on February 25, 1974, the entries were liquidated at the entered values.

On May 28, 1974, plaintiff tendered a deposit of $41,992.35 to Customs and on April 23, 1976, tendered an additional deposit of $50,000 to Customs. These tenders in the total amount of $91,992.35 were made by plaintiff on its own initiative and without request or demand by Customs in order to limit its potential penalty liability by complying with the "voluntary disclosure" practice of Customs. More particularly, the tender was made pursuant to an established practice of Customs—that was later embodied in 19 CFR 171.1(a) (effective Jan. 16, 1975)—under which a voluntary disclosure of violations of the Customs laws, accompanied by a deposit of an amount equal to the total loss of revenue to the Government will, in specified circumstances, result in the Customs Service's mitigating the penalty to an amount not exceeding the Government's total loss of revenue.

Subsequently, on January 6, 1977, Customs demanded payment of $7,926,778 from plaintiff as forfeiture value on the basis of (1) the undervaluation of the merchandise; (2) false freight figures; and (3) the failure to report the true constructed value figures. In response to this demand for payment, plaintiff, on November 16, 1977, filed a petition under section 618 of the Tariff Act of 1930, as amended (19 U.S.C. 1618) for remission or mitigation of the claim for forfeiture value. Some 18 months later, on June 15, 1979, Customs notified plaintiff that although the merchandise was, through false invoices, undervalued in the amount of $174,573.21, the statute of limitations had run out on January 28, 1979, on all entries and that the claim for forfeiture value was therefore remitted in its entirety.

On June 29, 1979, plaintiff requested a refund of its deposit of $91,992.35. This request was denied by the District Director of Customs on August 6, 1979. In his letter of denial the District Director informed plaintiff that although the penalty of $7,926,778 was barred by the statute of limitations, the actual loss of revenue to the Government was $174,573.21 and that he assumed that the $91,992.35 had been tendered by plaintiff to cover part of that loss.

On October 22, 1979, plaintiff filed a protest against the refusal to refund the $91,992.35 which protest was denied on December 11, 1979. Suit in this court followed.

Against this background, plaintiff argues that section 514(a)(3) should be construed so as to interpret the term "exaction" therein to

cover the refusal by Customs to refund the deposits here in issue. However, there are several difficulties with this argument. In the first place, plaintiff's argument is at odds with the plain meaning of the term "exaction." For the following dictionary definitions make clear that an "exaction" is involved only where there is a demand for or the compelling of payment:

The Random House Dictionary of the English Language (1969):

> Exaction—1. the act of exacting; extortion * * * 2. something exacted * * * a demanding.

The term "exact" is defined as (ibid):

> Exact.— * * * 6. to call for, demand, or require * * *. 7. to force or compel payment, yielding, or performance of * * *.

Black's Law Dictionary (1968):

> Exaction.—The wrongful act of an officer or other person in *compelling* payment of a fee or reward for his services, under color of his official authority, where no payment is due. [Italic added.

Webster's New Twentieth Century Dictionary of the English Language (unabridged, 2d ed.) (1959):

> Exaction, n. [L. exactio (-onis), a driving out, expelling, a tax, tribute, from exactus pp. of exigere, to drive out, demand, exact.]
> 1. An exacting, as of strength, money, time, etc.; the act of demanding with authority and compelling to pay or yield; or levying or drawing from by force; a driving to compliance; as, the *exaction* of tribute or of obedience.
> 2. An excessive demand; extortion.
> 3. That which is exacted; an enforced fee, tax, etc.

In light of the foregoing definitions, plaintiff's payment of the moneys in question voluntarily and without legal obligation or compulsion can hardly constitute an "exaction". At the very least, to constitute an "exaction" under section 514(a)(3) there would have had to have been some compulsion on the part of Customs requiring plaintiff to have paid the moneys. That there was no such compulsion here is manifest from the record. Indeed, at the time the tenders were made by plaintiff, no penalty was even asserted against plaintiff let alone any demand for payment.

Nor does the refusal of Customs to refund the moneys plaintiff tendered to it constitute an exaction. As this court stated in *Alberta Gas Chemicals, Inc.* v. *Blumenthal*, 82 Cust. Ct. 77, 81–2, C.D. 4792, 467 F. Supp. 1245, 1249–50 (1979):

> [F]rom a review of a long line of cases involving "charges" and "exactions," it is obvious that these terms have been applied to *actual assessments of specific sums of money* (other than ordinary customs duties) on imported merchandise. * * * In the instant case, there has been no assessment of any "charge" or "exaction,"

nor any order or finding entering into a charge or exaction. [Italic added.]

The considerations thus set out in *Alberta Gas* are equally applicable here.

Plaintiff next argues that the term "exaction" in section 514(a)(3) should be construed broadly so as to cover the refusal by Customs to refund the deposits in issue. Otherwise, plaintiff says, judicial review would be unavailable. In this connection, plaintiff states (correctly) that there is no specific provision for protesting a refusal to refund money deposited in the Treasury on account of a fine, penalty, or forfeiture which is subject to remission. However, it maintains that Congress would not enact this statute without providing for judicial review of the correctness of the decisions thereunder. The short answer is that the appropriate district court—and not this court—has jurisdiction under section 592 of the Tariff Act of 1930, as amended (19 U.S.C. 1592) to judicially review the correctness of the decisions of the Customs Service in penalty cases. See, e.g., *Sheldon & Co. et al.* v. *United States*, 8 Ct. Cust. Appls. 215, 218, T.D. 37455 (1917); *M. M. Scher & Sons, Inc.* v. *United States*, 24 Cust. Ct. 243, C.D. 1241 (1950). See also, e.g., Senate Finance Committee Report on H.R. 8149, the Customs Procedural Reform and Simplification Act of 1978 (S. Rep. No. 95–778, 95th Congress, 2d session 17–21).

In further support of its position that section 514 should be construed broadly to cover the deposits here in issue, plaintiff relies principally on *United States* v. *C. J. Tower & Sons of Buffalo, Inc.*, 61 CCPA 90, C.A.D. 1129, 499 F. 2d 1277 (1974). In *Tower* the Court of Customs and Patent Appeals affirmed a decision of this court that the court had jurisdiction of a protest under section 520(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)) against refusal to reliquidate to correct a mistake of fact even though section 514 did not specifically refer to a mistake of fact or inadvertence but only to "clerical error". From what has been said, the *Tower* case clearly is irrelevant to any issue here.

Finally, plaintiff has moved to amend its complaint to include claims under sections 514(a)(1) and 514(a)(2) of the Tariff Act of 1930, as amended, which sections grant the court jurisdiction of denied protests covering the appraised value of merchandise and the classification and rate and amount of duties chargeable. Leaving aside the question of the timeliness of this motion—which was filed after defendant filed a motion to dismiss and an alternative motion for summary judgment—the case is a penalty case and not an appraisement or classification case. It is true that a penalty case may involve, among other things, questions of appraisement and classification. Such questions, however, must be resolved in the penalty proceeding and not

in an appraisement or classification proceeding. In these circumstances, plaintiff's motion to amend the complaint by having the court treat the action as one for appraisement or classification is denied.

For the foregoing reasons, defendant's motion for summary judgment is granted; plaintiff's cross-motion for summary judgment is denied; and the action is hereby dismissed.

(C.D. 4874)

GODCHAUX-HENDERSON SUGAR CO., INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Nicaraguan Sugar—Generalized System of Preferences

Court No. 77-2-00257

SECTION 520(c)(1)—IMPORTER'S FAILURE TO ENTER MERCHANDISE PRIOR TO TERMINATION OF DUTY-FREE STATUS UNDER GSP DUE TO IGNORANCE OF GSP STATUS

By Executive Order 11906, the President terminated the duty-free status under the Generalized System of Preferences (19 U.S.C. 2461, et seq.) of a number of products, including Nicaraguan sugar, effective with respect to merchandise entered, or withdrawn from warehouse, for consumption on or after February 29, 1976. Plaintiff imported Nicaraguan sugar on February 24, 1976, which was unladen at the Port of New Orleans under an immediate delivery permit, but no consumption entry was filed at that time. At the time of importation, plaintiff was not aware of the duty-free status of Nicaraguan sugar under the GSP. On March 3, 1976, plaintiff learned for the first time that the importation of Nicaraguan sugar could have been entered duty free under the GSP, but that the duty-free status of that merchandise terminated on February 29, 1976, by virtue of the Executive order. The shipment was entered as dutiable on March 9, 1976, and liquidated accordingly on May 14, 1976.

In this action, predicated upon section 520(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1), plaintiff claims that its failure to enter the shipment duty-free prior to February 29, 1976 (the effective date of Executive Order 11906), was due to "clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law" within the meaning of the statute. In an opinion by Newman, J., *held:* Even assuming arguendo that the duty-free status of the merchandise under the GSP does not involve "construction of a law," which is excluded from relief under section 520(c)(1), plaintiff's failure to file a duty-free entry by the deadline prescribed by law is not within the scope of that section.

SECTION 520(c)(1)—MISTAKE OR INADVERTENCE IN "ENTRY"

By the express terms of section 520(c)(1), plaintiff was required to establish "a clerical error, mistake of fact, or other inadvertence * * * in [an] *entry, liquidation, or other customs transaction* * * * ". [Italic added.] There is nothing in either section 520(c)(1) or the legislative history cited by plaintiff which suggests that Congress intended the statute to be remedial in situations where, as here, the importer mistakenly or inadvertently failed to make an entry within the time limit prescribed by law to obtain duty-free treatment. In the present case, the merchandise was not entered until March 9, 1976, on which date the merchandise concededly was no longer eligible for duty-free treatment. Consequently, in plaintiff's dutiable entry on March 9, 1976, there was no mistake or inadvertence. Plaintiff's "mistake" or "inadvertence" was not in an *entry*, but rather in *failing to make an entry* prior to February 29, 1976. Had plaintiff, through mistake of fact or inadvertence, filed a dutiable entry *prior to February 29, 1976* (when the merchandise concededly was duty free) and the entry was liquidated accordingly, the entry could be reliquidated duty free pursuant to section 520(c)(1). Cf. *C.J. Tower & Sons of Buffalo* v. *United States*, 68 Cust. Ct. 17, C.D. 4327, 336 F. Supp. 1395 (1972), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F. 2d 1277 (1974).

SAME

Section 520(c)(1) is not remedial for every conceivable form of mistake or inadvertence adverse to an importer, but the statute offer "limited relief in the situations defined therein." *Phillips Petroleum Company* v. *United States*, 54 CCPA 7, 11, C.A.D. 893 (1966).

[Judgment for defendant.]

(Decided September 19, 1980)

Lord, Day & Lord, Esqs. (*Peter J. McKenna*, Esq. of counsel) for the plaintiff. *Alice Daniel*, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *James A. Resti*, trial attorney, for the defendant.

NEWMAN, Judge: We have heard repeatedly that "truth is stranger than fiction". But it is? Here, the inquiry does not end with that saying—it only begins.

In this action, plaintiff seeks reliquidation of its entry of March 9, 1976, pursuant to section 520(c)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)) (hereinafter section 520(c)(1)). That section reads:

> (c) *Reliquidation of entry.*—Notwithstanding a valid protest was not filed, the appropriate Customs officer may, in accordance

with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other Customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within 1 year after the date of entry, or transaction, or within 90 days after liquidation or exaction when the liquidation or exaction is made more than 9 months after the date of the entry, or transaction; * * *.

The pertinent facts in this unusual case may be summarized as follows:[1]

On February 24, 1976, plaintiff imported from Nicaragua 9,239,546 pounds of raw cane sugar, which were unladen at the Port of New Orleans under an immediate delivery permit. Under such permit, plaintiff was allowed to import the sugarcane without filing a consumption entry for 10 business days after release of the merchandise, in this case until March 9, 1976.[2]

As part of the Trade Act of 1974, title V, "section 501, et seq. (19 U.S.C. 2461, et seq.), Congress enacted the Generalized System of Preferences" (GSP), whereby the President was granted authority to extend duty-free treatment to eligible articles from any beneficiary developing country designated by him. The GSP permits the President to withdraw, suspend or limit the application of duty-free treatment with respect to any article or any country. By Executive Order 11888, dated November 24, 1975, the GSP was made operative as of January 1, 1976, 40 F.R. 55275, T.D. 75–304 (1975). Among many articles designated for duty-free treatment was Nicaraguan sugar, the subject merchandise. The list of eligible articles and beneficiary developing countries has been amended from time to time by Presidential Executive order, and these changes have been made effective as of the date the merchandise is entered, or withdrawn from the warehouse, for consumption. As pointed out in Sturm, "Customs Law and Administration" (1980), page 731: "This causes difficulties

[1] The record comprises the testimony of two witnesses each for plaintiff and for defendant. Additionally both parties submitted documentary exhibits; and the official entry papers were admitted in evidence as an unnumbered exhibit. Plaintiff's witnesses were: Al Hampton, who at the time of importation of the subject merchandise was assistant to the raw sugar buyer and plaintiff's treasurer, but at the time of trial was no longer employed by plaintiff; and Margaret McAuliffe, secretary-treasurer of Philbin, Cazalas & St. John, Inc., plaintiff's customhouse broker. Defendant's witnesses were: Joanne Cornelison, Acting Director of classification and Value for Customs at the Port of New Orleans, who at the time of entry of the merchandise was Supervisory Import Specialist; and Robert Abramson, Acting Assistant Regional Commissioner for Administration, who at the time of entry was Director of Classification and Value at the Port of New Orleans.

[2] See 19 CFR 142, et seq., which set forth the requirements and procedures relative to special permits for immediate delivery of merchandise *prior to entry*, as authorized by sec. 448(b), Tariff Act of 1930 as amended (19 U.S.C. 1448(b)).

since the annual changes required by the competitive need requirements of the statute are usually made on very short notice." The author's prescient observation as we shall see here, concerns a change most certainly "made on very short notice."

From January 1, 1976 (date of implementation of the GSP), through February 28, 1976, the subject merchandise was eligible for duty-free treatment under the GSP. On February 26, 1976, the President proclaimed by Executive Order 11906 certain modifications in the GSP, which involved changes in specific country eligibility for duty-free preferential treatment for numerous products. The Executive order signed by the President to implement the changes in the GSP was published in the Federal Register on February 27, 1976 (41 F.R. 8758) and was made applicable with respect to articles entered, or withdrawn from warehouse, for consumption on or after the effective date of February 29, 1976. Thus, Executive Order 11906 was dated on a Thursday, published in the Federal Register on Friday, and became effective on Sunday.[3] Special arrangements were available for entries at night and on Saturday. Hence, in view of the short period of time from the notice of the President's Executive order eliminating a commodity or country from the GSP and the effective date of such order, it is readily understandable how an importer could fail to meet a deadline for filing a duty-free entry.

The evidence in this case establishes that the importation was purchased from Amerop Corp., and that the seller sent plaintiff a telex on February 13, 1976, advising, inter alia, that the shipment would be eligible for duty-free entry. As mentioned supra, the shipment arrived at the Port of New Orleans on February 24, 1976, and instead of being entered for consumption, plaintiff utilized an immediate delivery permit. Both plaintiff and its customhouse broker, Philbin, Cazalas & St. John, Inc. (Philbin), were cognizant at the time of importation that the subject merchandise orginated in and was exported from Nicaragua. Moreover, Margaret McAuliffe, who was a licensed customhouse broker and responsible for plaintiff's account at Philbin, was aware that Nicaragua was one of the countries receiving duty-free treatment under the GSP. Nevertheless, it appears that at the time of importation neither McAuliffe nor Al Hampton, who was responsible in plaintiff's company for matters pertaining to the importation of sugar and the payment of duties for plaintiff, was aware that the subject shipment was then entitled to duty-free entry. The evidence shows that Hampton was not aware of the specific

[3] See Sturm, supra, p. 731, for other instances in which there similarly were changes in eligible articles and countries on very short notice. At the trial, defendant's witness Cornelison testified that at the Port of New Orleans, notices of changes in the GSP were received "a maximum of a day or two before the effective date so these [notices to brokers and importers] are disseminated in a great rush" (R. 221).

countries which qualified for GSP treatment, and further, that Hampton overlooked the specific advice in Amerop's telex of February 13, 1976, that the shipment would be duty free. Significantly, on February 26, 1976, Hampton arranged for and had a check drawn for the payment of duties and forwarded such check to Philbin, which Philbin received on February 27, 1976. McAuliffe relied upon this check as an indication that the shipment was duty payable.

The evidence further shows that McAuliffe received a telephone call on February 26, 1976, from a Miss Bennett, an import specialist with Customs at New Orleans. Bennett informed McAuliffe that certain countries (which, according to McAuliffe, were not specifically identified) were to be eliminated from the GSP program; and more, Bennett urged McAuliffe to immediately enter any eligible sugar shipments.[4] Unfortunately and for whatever reason, McAuliffe then labored under the false impression that the subject importation was not eligible for duty-free treatment.

On March 3, 1976, Hampton received a telephone call from Amerop, and thereupon discovered that a discrepancy in the pricing of the sugar was due to the fact that the seller made no deduction for duty from the price initially quoted. It was at this point in time that Hampton first became aware that the subject shipment qualified for duty-free entry under the GSP. Hampton then telephoned Customs on the same date (March 3) and learned through Bennett that the duty-free status of Nicaraguan sugar had terminated on February 29, 1976.[5] Nevertheless, on March 4, 1976, Hampton telephoned McAuliffe at Philbin and instructed her to enter the merchandise duty free and return the check sent for payment of duties. On that same date, Philbin attempted to file a duty-free entry with Customs, but such entry was rejected for the reason that Nicaraguan sugar was no longer entitled to duty-free entry by virtue of the President's Executive Order. On March 9, 1976, the merchandise was entered as dutiable and was liquidated accordingly on May 14, 1976.[6]

As mentioned at the outset, this action is predicated upon section 520(c)(1). The gravaman of the action is that plaintiff failed to enter its shipment duty free under the GSP before the effective date of Executive Order 11906 due to "clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law" within the meaning of section 520(c)(1), and therefore Customs

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[4] Bennett died in December 1977, and the consequent inability of the court to observe her demeanor, and for the parties to examine and cross-examine her concerning the information she furnished to McAuliffe created a complicating factor for the court and counsel.

[5] Hampton also received written notice from Customs by mail on Mar. 4, 1976, respecting Executive Order 11906. Additionally, he received a copy of the order from Phibin on the same date. Philbin received notice of the order in its box at the customhouse.

[6] Plaintiff was assessed duty in the amount of $59,199.06.

erred in refusing to reliquidate the entry duty free pursuant to that section.

Defendant maintains that the record as a whole shows that there was no mistake or inadvertence by plaintiff in not filing an entry by February 29, 1976;[7] and that even accepting as true the evidence most favorable to plaintiff, the failure to enter the merchandise prior to February 29 was due to plaintiff's erroneous legal conclusion that the merchandise did not qualify for duty-free treatment under the GSP rather than ignorance of facts. Further, defendant insists that the presumption of correctness attaching to Customs' refusal to reliquidate the entry under section 520(c)(1) has not been overcome by plaintiff.

Respecting the factual issue raised by defendant as to whether plaintiff's unfortunate predicament was due to mistake or inadvertence, I must in all candor state that the facts urged by each of the parties appear somewhat anomalous, indeed, almost incredible. Further, I must confess that much of the testimony of the witnesses strains credulity and brooks reality. It would not be unfair to state that the record in this case is like a jigsaw puzzle with many missing parts, and it is difficult to discern what the completed puzzle is intended to depict. Consequently, it would be a simple matter to find that for lack of veracity of its evidence, plaintiff has failed to sustain its burden of proof However, I am not inclined to that easy approach because at the trial of this case in New Orleans on December 6 and 7, 1979, I was impressed by the ostensibly sincere and honest endeavor of all the witnesses, both plaintiff's and defendant's to recall, as best as they could, the confluence of elusive events that occurred more than 3 years prior thereto in February 1976.

The evidence viewed most favorably to plaintiff establishes that plaintiff's failure to file a consumption entry for the subject merchandise prior to February 29, 1976, was due to plaintiff's (and its broker's) ignorance of the duty-free status of the merchandise under the GSP. The core issue is whether section 520(c)(1) is remedial under these circumstances.

Viewed dispassionately, the record precludes any determination but one—that plaintiff has failed to sustain the requisite burden.

Even assuming arguendo that the duty-free status of the merchandise under the GSP does not involve construction of a law, which is excluded from relief under section 520(c)(1),[8] I have concluded that

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[7] Defendant's position, in essence, is that plaintiff failed to enter the subject merchandise prior to Feb. 29, 1976, knowing that prior to that date the merchandise had a duty-free status under the GSP.

[8] For the distinction between "mistake of law" and "mistake of fact" under sec. 520(c)(1) see *Hambro Automotive Corporation* v. *United States*, 66 CCPA 113, C.A.D. 1231, 603 F. 2d 850 (1979). Cf. *International Forwarding Co.* v. *United States*, 9 Cust. Ct. 428, Abs. 47630 (1942) (importer failed to file document for tax exemption due to ignorance of the law).

plaintiff's failure to file a duty-free entry by the deadline prescribed by the Executive Order is not within the scope of that section.

By the express terms of section 510(c)(1), plaintiff had the burden of establishing "a clerical error, mistake of fact, or other inadvertence * * * *in* [*an*] *entry, liquidation, or other customs transaction* * * *." (Italic added.) *Geo. Wm. Rueff, Inc.* v. *United States*, 41 Cust. Ct. 331, 334, abs. 62204 (1958). The legislative history of section 520(c)(1), relied upon by plaintiff,[9] demonstrates that Congress intended the statue to eliminate injustice resulting from certain errors, mistakes, and inadvertences in an entry, liquidations, and other Customs transaction. However, I see nothing in either section 520 (c)(1) or the legislative history cited by plaintiff which suggests that Congress intended the statute to be remedial in situations where, as here, the importer mistakenly or inadvertently *failed to make an entry* within the time limit prescribed by law to obtain duty-free treatment. In the present case, the merchandise was not entered until March 9, 1976, on which date the merchandise concededly was no longer eligible for duty-free treatment. Consequently, in plaintiff's dutiable entry on March 9, 1976, there was no mistake or inadvertence. Simply put, plaintiff's "mistake" or "inadvertence" was not in an *entry*, but rather in *failing to make an entry* prior to February 29, 1976. Section 520(c)(1) is not remedial for *every* conceivable form of mistake or inadvertence adverse to an importer, but rather the statute offers "limited relief in the situations defined therein." *Phillips Petroleum Company* v. *United States*, 54 CCPA 7, 11, C.A.D. 893 (1966). I cannot disregard the cutoff date for duty-free entry established by Executive Order 11906 simply on the tenuous basis that plaintiff mistakenly assumed that the merchandise did not qualify for GSP treatment.

In support of its position, plaintiff cites *C. J. Tower & Sons of Buffalo* v. *United States*, 68 Cust. Ct. 17, C.D. 4327, 336 F. Supp. 1395 (1972), *aff'd*, 61 CCPA 90, C.A.D. 1129, 499 F. 2d 1277 (1974). There, the importer was unaware at the time of entry that the shipment at issue comprised emergency war material entitled to duty-free entry. The importation was entered as dutiable, and was liquidated accordingly. Central to the issue presented was the construction of section 520(c)(1). Judge Ford found that the importer's lack of knowledge of the facts justifying duty-free entry clearly came within the statutory language, "mistake of fact, or other inadvertence," and sustained plaintiff's claim that the entry should have been reliquidated pursuant

[9] *Simplification of Customs Administration: Hearings on H.R. 1535 before the House Comm. on Ways and Means*, 82 Congress, 1st session 42 (1951); S. Rep. No. 632, 83d Congress, 1st session, *reprinted* in (1953) *U.S. Code Cong. & Admin. News* 2283.

to section 520(c)(1). On appeal, Judge Rich, writing for the Court of Customs and Patent Appeals, affirmed.

But the present case is clearly distinguishable from *Tower*. In *Tower*, the merchandise was duty free *at the time of entry*, but through mistake of fact was entered as dutiable. Here, at the date of entry (Mar. 9, 1976) the merchandise was properly dutiable since it no longer qualified for duty-free treatment under the GSP. Hence, in the present case there was no mistake of fact or inadvertence in the *entry filed on March 9, 1976*. The admittedly duty-free status of the Nicaraguan sugar prior to February 29, 1976, does not establish any mistake of fact or inadvertence in the dutiable entry of March 9, 1976.[10] There is no dispute that had the merchandise herein been entered prior to February 29, 1976, it would have been eligible for duty-free entry under the GSP.[11] Following the rationale of *Tower*, it would appear that if through mistake of fact or inadvertence the Nicaraguan sugar had been entered as dutiable *prior to February 29, 1976*, and liquidated accordingly, the entry could be reliquidated duty free pursuant to section 520(c)(1).[12] Since the merchandise herein was not duty free on the date of entry, *Tower* is inapposite.

While I sympathize with plaintiff's unhappy predicament in this case, and the short notice given by Customs of the changes in the GSP has not been lost on the Court, I am constrained to hold that the scope of relief afforded by section 520(c)(1) is not addressed to the facts and circumstances disclosed by the record.

Finally, it is appropriate to record the professional manner in which all counsel conducted themselves at the trial. Plaintiff's attorney faced an obviously difficult situation; defendant's attorneys responded effectively. The demeanor and efforts of all counsel do credit to our profession.

The action is dismissed. Judgment will be entered accordingly.

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[10] In its briefs, plaintiff's counsel repeatedly states that the merchandise was "entered" on Feb. 24, 1976 thus confusing the date of importation with the date of entry. However, plaintiff's counsel recognizes that the merchandise was not "formally" entered until Mar. 9, 1976. Although, as pointed out by plaintiff (brief, at 6) the merchandise was duty free "at the time of importation," changes in eligible articles and counties under the GSP are effective as of the date of entry. See Sturm, p. 731.

[11] Both plaintiff's witness McAuliffe and defendant's witness Abramson agreed that, if the documents proffered on Mar. 9, 1976 had been submitted by plaintiff before Feb. 29, 1976, the merchandise would have qualified for duty-free treatment under the GSP (R.143, 299-300).

[12] This assumes, of course, that the documents required for duty-free entry are submitted.

(C.D. 4875)

OVERTON & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Jordan Bars

BARS—SHAPE OF CROSS-SECTION—MATERIALS

So-called Jordan bars with a double bead or spur did not have a cross section in any of the shapes specified in headnote 3(d), schedule 6, part 2, subpart B, and hence were erroneously classified by Customs as bars under item 608.52, TSUS. The merchandise was ultimately dedicated to use and used solely as parts of Jordan Refiners, which are machines used for grinding paper or preparing paper stock. However, the merchandise required substantial additional processing after importation before it could be used as parts of Jordan Refiners. Consequently, in their condition as imported, the Jordan bars were materials rather than parts, and were properly dutiable as shapes under item 609.82, TSUS, as primarily claimed by plaintiff. *John V. Carr & Son, Inc.* v. *United States*, 72 Cust. Ct. 19, C.D. 4500 (1974).

Court No. 77-6-01002

[Judgment for plaintiff.]

(Decided September 23, 1980)

Doherty and Melahn, Esqs. (*William E. Melahn* and *Peter T. Middleton*, Esqs. of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*John J. Mahon*, Esq., at the trial and *James A. Resti*, Esq., on the brief), for the defendant.

NEWMAN, Judge: The issue in this case concerns the proper tariff classification for certain imported steel products described on the commercial invoice included in the official entry documents as 'Hot Rolled Sectional Steel, alloyed, not annealed, our brand '65 EN 2 G', acc. to AISI 8665, Profile D-84555, in bars of 89½" with shorts max. 5%, Tol. +1", our no. 567, ends sawn". The subject merchandise was exported from West Germany and entered at the Port of New York in 1975. Plaintiff, a customhouse broker, entered the merchandise for the account of Wetherell Bros. Co., the ultimate consignee.

In liquidating the entry, Customs classified the importation under the provision in item 608.52, TSUS, for bars of alloy steel, and assessed duty at the rate of 10.5 per centum ad valorem, plus additional duties on the chromium and molybdenum content.[1] Plaintiff pri-

[1] Additional duties were assessed on the chromium and molybdenum content at the rates prescribed in items 607.01 and 607.02, TSUS. See headnote 4, subpart B, part 2, schedule 6. These additional duties are not contested.

marily claims that the merchandise is properly dutiable under item 609.82, TSUS, as angles, shapes, and sections of alloy iron or steel, at the rate of 0.1 cent per pound plus 2 per centum ad valorem, plus additional duties on the chromium and molybdenum content. Alternatively, plaintiff claims that the merchandise is dutiable as parts for pulp or paper machines under either item 668.04, TSUS, at the rate of 7 per centum ad valorem, or under item 668.06, TSUS, at the rate of 3.5 per centum ad valorem.

Plaintiff also advances the claim that the Government's classification of the merchandise under item 608.52, TSUS, constituted a change in a prior established and uniform practice of classifying the subject merchandise under item 609.82, TSUS, without notice in violation of section 315(d) of the Tariff Act of 1930, as amended (19 U.S.C. 1315(d)).

For the reasons indicated hereinafter, plaintiff's primary claim under item 609.82, TSUS, is sustained.

STATUTES INVOLVED

Schedule 6, Part 2, Subpart B, TSUS
Subpart B headnotes:

* * * * * * *

3. *Forms and condition of iron or steel.*— For the purposes of this subpart, the following terms have the meanings hereby assigned to them:

* * * * * * *

(d) *Bars:* Products of solid section not conforming completely to the respective specifications set forth herein for blooms, billets, slabs, sheet bars, wire rods, plates, sheets, strip, wire, rails, joint bars, or tie plates, and which have cross sections in the shape of circles, segments of circles, ovals, triangles, rectangles, hexagons, or octagons. Deformed concrete reinforcing bars are hot-rolled steel bars, of solid cross section, having deformations of various patterns on their surfaces.

* * * * * * *

(j) *Angles, shapes, and sections:* Products which do not conform completely to

	the respective specifications set forth herein for blooms, billets, slabs, sheetbars, bars, wire rods, plates, sheets, strip, wire, rails, joint bars, or tie plates, and do not include any tubular products.	
	* * * * * * *	
Classified:		
	Bars of steel:	
	* * * * * * *	
	Other bars:	
	* * * * * * *	
608.52	Alloy steel	10.5% ad val.+ additional duties.
Primary claim:		
	Angles, shapes, and sections, all the foregoing, of iron or steel, hot-rolled, forged, extruded, or drawn, or cold-formed or cold-finished, whether or not drilled, punched, or otherwise advanced; sheet piling of iron or steel:	
	Angles, shapes, and sections:	
	Hot-rolled; or, cold-formed and weighing over 0.29 pound per linear foot:	
	Not drilled, not punched, and not otherwise advanced:	
	* * * * * * *	
609.82	Alloy iron or steel	0.1¢ per lb. + 2% ad val. + additional duties
Alternative Claims:		
Schedule 6, Part 4, Subpart D:		
	Machines for making cellulosic pulp, paper, or paperboard; machines for processing or finishing pulp, paper, or paperboard, or making them up into articles:	
*	* * * * * * *	
	Parts of the foregoing machines:	
668.04	Bed plates, roll bars, and other stocktreating parts for pulp or paper machines	7% ad val.
	Other:	
668.06	Parts of machines for making cellulosic pulp, paper or paperboard	3.5% ad val.

19 U.S.C. 1315
§ 1315. Effective date of rates of duty.

* * * * * * *

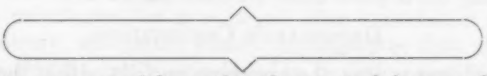
(d) No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the weekly Treasury decisions of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties, * * *.

THE RECORD

At the trial, plaintiff presented the testimony of four witnesses: James Harvey McKenney III, general manager in charge of sales and purchasing for Wetherell Bros. Co.; Reinhold Schempp, retired employee of the Crucible Steel Co. of America (presently called the Crucible Specialty Division of Colt Industries); Harvey McKenney, president of Wetherell Bros. Co.; and Ralph E. Baldwin, a consultant with Black Clawson Co. Additionally, plaintiff introduced in evidence the official entry papers as an unnumbered exhibit and 14 numbered exhibits. Defendant called no witnesses, but introduced into evidence two exhibits.

The pertinent facts are:

Plaintiff's profile D84555, known as a "Jordan profile", or "Jordan bar", is ¼ inch thick, 2¾ inches wide, and 89½ inches in length. The cross sectional shape of the merchandise, as depicted by plaintiff's exhibit 1, is set forth below:



Jordan bars are a specialty rather than a stock item, and were used only for incorporation in a tapered plug of a Jordan Refiner, which is used to grind paper or prepare paper stock. A double spur or bead projects from the top and bottom horizontal surfaces of the profile D84555 and runs the full 89½-inch length of the material. This double bead or spur is made to precise specifications as to the location and height, and is essential to the use of the Jordan bars in Jordan Refiners.

The D84555 profiles must be processed after importation before they can be used as parts of Jordan Refiners. Black Clawson Co., who purchased the imported merchandise from Wetherell, processed it for installation in a tapered plug of a Jordan Refiner. After the profiles were taken from storage, they were cut into two pieces, "to make a

long and a short Jordan bar" (R. 126). These pieces were then trimmed, punched, beveled, and their bottom edges ground. Some customers of Black Clawson required, in addition to the foregoing processing, heat treating of the material, and often the ultimate customer (papermill) put sand on the material which, then, was further ground. Each set of Jordan bars was custom-made for each Jordan machine.

Prior to 1966 the merchandise was classified by Customs as bars; from 1966 to the entry in this case in 1975, the merchandise was classified as shapes; and since the entry in this case, the merchandise has been classified by Customs as bars. Wetherell received no notice concerning the change in classification of the merchandise in 1975.

Finally, there is no dispute that the subject merchandise is an alloy iron or steel shape, hot-rolled (see paragraph 3 of the complaint and of the answer), weighing over 0.29 pound per linear foot; and that it was not drilled, punched, or otherwise advanced.

Plaintiff's Contentions

Plaintiff primarily contends that the Jordan bars are shapes within the meaning of that term as defined in headnote 3(j) of schedule 6, part 2, subpart B, TSUS, and are classifiable under item 609.82, TSUS. Alternatively, plaintiff argues that since the merchandise is dedicated to use as parts of Jordan Refiners, it is classifiable either as stock-treating parts for pulp or paper machines under item 668.04, TSUS, or as other parts of machines for making paper under item 668.06, TSUS. Plaintiff also maintains that the Government did not follow the procedure prescribed in section 315(d) of the Tariff Act of 1930, as amended, for changes in an established and uniform practice in classifying the imports under item 609.82, TSUS.

Defendant's Contentions

Defendant insists that the merchandise falls within the definition of "bars" assigned to that term by headnote 3(d) of schedule 6, part 2, subpart B, TSUS, and therefore the merchandise was properly assessed under item 608.52, TSUS. Further, defendant argues that the merchandise constitutes a material, and as such, is precluded from classification as parts under item 668.04 or item 668.06, TSUS. However, according to defendant, if the imports are parts, they are classifiable as stock-treating parts within the purview of item 668.04, TSUS. Lastly, respecting plaintiff's claim under section 315(d), defendant urges that there is no evidence of a finding nor of the existence of an established and uniform practice of classification of the merchandise under item 609.82, TSUS.

Opinion

I

At the outset, it should be noted that we are not required to as-

certain the common meaning of the term "bar" or "shape," since those terms have been statutorily defined. Such statutory definitions are, of course, determinative of the scope of the tariff provisions for "bars" and "angles, shapes, and sections."

Thus, we first address the issue of whether the imports fall within the definition of "bars" (as classified by Customs) assigned to that term in headnote 3(d), schedule 6, part 2, subpart B. I agree with defendant's contention that if the subject merchandise is encompassed by the definition of "bars" in headnote 3(d), its classification as "shapes" is precluded by the definition of "angles, shapes, and sections" in headnote 3(j).

The term "bars" is defined in headnote 3(d) as:

> Products of solid section * * * which have cross sections in the shape of circles, segments of circles, ovals, triangles, rectangles, hexagons, or octagons.

The only geometric shape mentioned in headnote 3(d) that is claimed applicable by defendant is the rectangle. Plaintiff vigorously disputes that the merchandise has a cross section in the shape of a rectangle, pointing specifically to the double bead or spur protruding from the flat surfaces and running the length of the profiles.[2]

This issue under headnote 3(b) as to whether the shape of the cross section is rectangular is best resolved by an examination of a sample, as represented by plaintiff's exhibit 1. *Webster's Third New International Dictionary*, Unabridged (1966), page 1899, defines the term "rectangle" as a "parallelogram all of whose angles are right angles." Plainly, by virtue of the protruding double bead or spur, the cross section of exhibit 1 is not the shape of a rectangle. Moreover, there is nothing in the record suggesting that the double bead or spur is an aberration, unintended, or is removed after importation as useless. On the contrary, the record clearly demonstrates that the double bead in the D84555 profile is included in its design specifications and is essential for its use in the Jordan Refiner. Defendant did not offer any evidence by way of testimony or otherwise to show that the iron and steel industry recognizes the cross-sectional shape of the merchandise to be a rectangle.

Rather, defendant posits that in determining the cross-sectional shape of the merchandise, the double bead or spur should be ignored as a matter of law. This hypothesis is predicated upon the inclusion in headnote 3(d) of a definition of "deformed concrete reinforcing bars." A sample of a deformed concrete reinforcing bar was received in evidence as defendant's exhibit A. An examination of exhibit A reveals

[2] Plaintiff has raised no issue concerning the rounded sides of exhibit 1, and that aspect of the exhibit has been disregarded for the purposes of the decision in this case.

that it has a double spur as well as a spiral pattern running the length of the bar. Nonetheless, I am unable to agree with defendant's reasoning that because headnote 3(d) expressly includes a definition of deformed concrete reinforcing bars, the double bead on the subject merchandise should be disregarded in determining its cross-sectional shape. By specifically including a definition of deformed concrete reinforcing bars in headnote 3(d), it is apparent Congress recognized that these specialized bars, because of their "having deformations of various patterns on their surfaces", did not fit the general definition assigned to bars.[3] Hence, I see no inference from the specific inclusion of the reinforcing bars in headnote 3(d) that Congress intended to include in the definition of bars other merchandise not possessing the required cross-sectional shapes.

Defendant also urges that the double spur be disregarded on the basis that headnote 3(d) does not require the cross section of the merchandise be perfectly rectangular, circular, etc., but merely "that the product have a cross section in the shape of a rectangle, circle, ete." (brief at 21). Defendant has not cited any legislative history or other authority that shows Congress' intention to make any distinction between a rectangular cross section and a cross section in the shape of a rectangle.

The short of the matter is that the cross section of the subject merchandise does not conform to the shape specifications set forth in headnote 3(d) for bars, and consequently the Government's classification of the merchandise under item 608.52, TSUS, was erroneous. It therefore follows that the merchandise is not precluded from classification as "angles, shapes, and sections" as defined in headnote 3(j), schedule 6, part 2, subpart B, TSUS.

II

We now turn to plaintiff's claims. I have concluded that the merchandise is a shape properly dutiable under item 609.82, TSUS, and thus plaintiff's primary claim is sustained.

Although the Jordan bars were ultimately dedicated and used as parts of Jordan Refiners, in their condition as imported they required substantial additional processing before they could be used in Jordan machines. In point of fact, Jordan bars must be custom-made for the particular Jordan machine in which they are to be installed. Hence, the D84555 profiles in their imported condition were materials rather than parts, and since they meet the requirements of headnote 3(j), they are properly classifiable under item 609.82, TSUS.

In *John V. Carr & Son. Inc.* v. *United States*, 72 Cust. Ct. 19, C.D.

[3] It is also noted that in 1975 deformed concrete reinforcing bars were provided for eo nomine in items 608.40 through 608.42, TSUS.

4500 (1974), Judge Maletz exhaustively considered the tariff distinction between the TSUS provisions for angles, shapes and sections and parts, and made the following pertinent observations (72 Cust. Ct. at 27):

> It may well be that most angles, shapes and sections are ultimately dedicated and used as parts of articles and that such ultimate use determines the form in which the angles, shapes, and sections are made. See *United States* v. *The Singer Manufacturing Company*, 37 CCPA 104, 106, 107, C.A.D. 427 (1950). But this scarcely means that all angles, shapes and sections are parts per se. Thus, if in its imported condition, an angle, shape or section has been processed or advanced in manufacture only to a point where substantial additional processing is necessary before it can be used as a part of a given article, the import would not be classifiable as a part, but rather would be considered a material and thus (if meeting the other statutory requirements) classifiable under a provision for angles, shapes, and sections. See e.g., *United States* v. *The Singer Manufacturing Company, supra*, 37 CCPA 104; *Associated Metals & Minerals Corp.* v. *United States, supra*, 65 Cust. Ct. 586.

Following the rationale of *Carr, supra*, the Jordan bars are properly classifiable under item 609.82, TSUS, as "angles, shapes, and sections", and plaintiff's alternative claims under items 668.04 and 668.06 are without merit.[4]

In view of the holding herein, it is unnecessary to reach plaintiff's claim that there was an established and uniform practice from 1966 to 1975 of classifying the Jordan profiles under item 609.82, which the Government changed without giving the notice required by section 315(d) of the Tariff Act of 1930, as amended.

For the reasons stated herein, plaintiff's primary claim under item 609.82, TSUS, is sustained, but its alternative claims are dismissed. Judgment will be entered accordingly.

(C.D. 4876)

F. W. MYERS & CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Herbicide containing benzenoid wetting agent

Court No. 77-8-01386

The presence in an herbicide of less than 1 percent of a benzenoid wetting agent did not make the herbicide a mixture "in part" of that

[4] It is well established that the mere fact that imported merchandise is dedicated to use in making particular articles or parts does not take the merchandise out of the material class. See, e.g., *The Harding Co, et al.* v. *United States*, 23 CCPA 250, T.D. 48109 (1936) (automobile brake lining); *American Import Co.* v. *United States*, 26 CCPA 72, T.D. 49612 (1938) (fishing leader gut); *Bendix Mouldings, Inc.* v. *United States*, 73 Cust. Ct. 204, C.D. 4576, 388 F. Supp. 1193 (1974) (wood molding for picture or mirror frames).

wetting agent. A minute partial ingredient whose function is exhausted before the main ingredient begins to work and which is not otherwise present in a commercially significant quantity does not control the classification. Citing, *United States* v. *Aceto Chemical Co., Inc.*,64 CCPA 78, C.A.D. 1186, 533 F. 2d 685 (1977).

[Plaintiff's motion for summary judgment granted.]

(Dated October 1, 1980)

Rivkin, Sherman and Levy (*Mary Christine Carty* on the brief) for the plaintiff.
Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Sidney N. Weiss*, on the brief), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: Plaintiff has moved for summary judgment that the proper tariff classification of an herbicide known as "Sencor 50 Percent Wettable Powder" is as a mixture not specially provided for under item 432.00 of the Tariff Schedules of the United States (TSUS), and that it is dutiable at the rate of 5 percent ad valorem. Defendant, relying on the presence in the imported mixture of a benzenoid wetting agent, classified the importation under item 409.00 of the TSUS as a mixture in part of a product provided for in subpart C, part 1, schedule 4; dutiable at 3.5 cents per pound plus 22.5 percent ad valorem.

The relevant statutory provisions are as follows:

STATUTES INVOLVED

Tariff Schedules of the United States, 19 U.S.C. 1202:

* * * * * * *

GENERAL HEADNOTES AND RULES OF INTERPRETATION

* * * * * * *

9. *Definition.*—For the purposes of the schedules, unless the context otherwise requires—

* * * * * * *

(f) the terms "of", "wholly of" * * * "in part of" and "containing", when used between the description of an article and a material * * * have the following meanings:

* * * * * * *

(iv) "in part of" or "containing" mean that the article contains a significant quantity of the named material.

With regard to the application of the quantitative concept specified in subparagraphs (ii) and (iv) above, it is intended that the de minimis rule apply.

SCHEDULE 4—CHEMICALS AND RELATED PRODUCTS

Schedule 4 headnotes:

* * * * * * *

3. (a) The term "mixture," as used in this schedule means substances consisting of two or more ingredients (i.e., elements or compounds), whether occurring as such in nature, or whether artificially produced * * * which, however thoroughly comingled, retain their individual chemical properties and are not chemically united. * * *

PART 1. BENZENOID CHEMICALS AND PRODUCTS

Part 1 headnotes

1. Except as specifically set forth in the headnotes to other parts of this schedule, all products described in this part shall be classified hereunder even if more specifically described elsewhere in this schedule. * * *

* * * * * * *

Subpart C—Finished Organic Chemical Products

Products obtained, derived, or manufactured in whole or in part from any product provided for in subpart A or B of this part:

* * * * * * *

405.35	Products * * * chiefly used or any one or combination of the following purposes: as detergents, wetting agents, emulsifiers, dispersants, or foaming agents	1.7¢ per lb. + 12.5% ad val.

* * * * * * *

409.00	Mixtures in whole or in part of any of the products provided for in this subpart	3.5¢ per lb. + 22.5% ad val.

* * * * * * *

PART 2. CHEMICAL ELEMENTS, INORGANIC AND ORGANIC COMPOUNDS, AND MIXTURES

Part 2 headnotes

1. This part covers chemicals, except those provided for elsewhere in this schedule, and those specially provided for in any of the other schedules.

* * * * * * *

Subpart E—Chemical Mixtures

432.00	Mixtures not specially provided for	5% ad val., but not less than the highest rate applicable to any component material.

This herbicide was manufactured in Canada and imported in powder form in 1975 by the plaintiff customhouse broker. It kills

weeds by penetrating into their roots before they emerge from the ground and then inhibits the process of photosynthesis by which they would ordinarily grow. The recommended application is by means of mixing with water and spraying on the bare ground before or after planting of the desired crop. The benzenoid wetting agent constitutes less than 1 percent of the importation and aids the dispersal of the herbicide in water by reducing the surface tension between the powder and the water. Although it is not recommended, the powder can be applied in dry form to the ground, and reliance placed on soil moisture and rainfall for penetration.

Defendant has tried to create issues of fact and has attempted to avoid the impact of the decision in *United States* v. *Aceto Chemical Co., Inc.*, 64 CCPA 78, C.A.D. 1186, 533 F. 2d 685 (1977), affirming *Aceto Chemical Co., Inc.* v. *United States*, 75 Cust. Ct. 167, C.D. 4625, 408 F. Supp. 1389 (1975).

In that case the classification of a fungicide (containing less than 1 percent of a benzenoid wetting agent) as a mixture "in part" of a benzenoid product was held to be incorrect. While the appellate court recognized the general congressional intent that mixtures be assessed at the highest rate possible, it held that the intent was not to magnify the importance of minute ingredients whose function was exhausted before the principal ingredient began to operate.

Proper classification as "in part" required that the partial ingredient upon which classification is premised, perform the principal function, in which case its relative quantity was immaterial. See *Northam Warren Corp.* v. *United States*, 60 CCPA 117, C.A.D. 1092, 475 F. 2d 647 (1973). If this functional test was not satisfied then the only other justification for allowing a partial ingredient to control classification was its presence in a quantity which had some independent commercial significance.

The "issues of fact" which defendant asserts in this action regarding the quantity of the benzenoid wetting agent and its greater importance in this particular method of application are really quarrels with the result in the *Aceto* case. The determinative facts here are not in dispute. The quantity of benzenoid wetting agent is less than 1 percent of the importation and has no independent commercial significance. The wetting agent is not an herbicide. It helps the active agent get down to the roots but it does not participate in the inhibition of the weeds' photosynthesis.

In short, the decision in the *Aceto* case is stare decisis. It continues to be incorrect to classify a mixture as being "in part" of a minute benzenoid ingredient whose subsidiary function is exhausted before the principal ingredient begins to work, it is therefore

ORDERED, that plaintiff's motion for summary judgment be granted and, it is further

ORDERED, that the appropriate customs official reliquidate the entries covered by this civil action and classify the merchandise involved under item 432.00 of the TSUS, as a mixture not specially provided for, dutiable at the rate of 5 percent ad valorem.

(C.D. 4877)

CONCORD ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Electronic Equipment (Tape recorders, etc.)

EXPORT VALUE—SEPARABLE APPRAISEMENTS—BUYING COMMISSION

Tape recorders, parts, and other electronic equipment exported from Japan between April 1970, and May 1971, and appraised on the basis of export value as defined in 19 U.S.C.A. 1401a(b) at total invoice values less bank interest charges, *Held*, properly appraised under the export value basis at total invoice values less bank interest charges and commissions as claimed by the importer where the Government admits that an item invoiced as "Our Commission" was included as an element of value in the appraisements, and the uncontroverted evidence adduced by the importer in accordance with the principle of separability identifies the invoiced commission as a bona fide buying commission paid to the Hosho Corp. of Japan as the importer's agent for services which included routine inspection of the merchandise prior to shipment.

Court No. 74-6-01614

[Judgment for plaintiff.]

(Decided October 14, 1980)

Serko & Simon (*Carl R. Soller* and *Margaret H. Sachter* at the trial; *Joel K. Simon* with them on the brief); for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Jerry P. Wiskin* at the trial and on the brief), for the defendant.

RICHARDSON, Judge: The merchandise in this action consists of tape recorders, parts, and other electronic equipment exported from Japan and entered at the Port of New York between April 30, 1970 and May 11, 1971. The merchandise was appraised on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956). In issue under the export value basis is the dutiable status of an item designated on the invoices as "Our Commission". The importer contends that this item is nondutiable because it is a buying commission.[1]

[1] A claim in the complaint that certain inland charges are nondutiable was expressly abondoned by plaintiff.

The record in this action, hereinafter referred to as Concord II, consists of the testimony of four witnesses called on planitiff's behalf, the entry papers, some documentary exhibits, and the record in *Concord Electronics Corp.* v. *United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972), appeal dismissed, 60 CCPA 185 (1972), hereinafter referred to as Concord I, which was incorporated into the record in Concord II. In Concord I, an appellate term of the Customs Court affirmed the dismissal of the appeals for reappraisement which was rendered by a single judge (Maletz, J.) for failure of proof (R.D. 11744). Although Concord I involved the same parties and merchandise as are before the court in Concord II, the court never reached the issue as to the dutiable status of the commission in Concord I because the court found that the importer had never surmounted the separability hurdle, i.e., the capacity of a challenging party to limit its proofs to the single issue of the dutiability of the commission, owing to the severable character of the appraisement. The Concord I court reasoned that

> *there is no evidence to show what the appraising officer did* except that he placed a red check mark in the column headed "Appraised" on the summary sheet, thus indicating that the appraised value agreed with the entered value. (P. 244.) [Italic added.]

And the court went on to conclude that

> even if the commissions are bona fide buying commissions, they may not be deducted from the appraised values in order to establish different dutiable values, in the absence of evidence of all the elements of export value * * *. (Pp. 246–247.)

Concord II raises again the separability issue and the related issue as to the bona fides of the alleged buying commission. With respect to separability, the record in Concord II shows that plaintiff requested of defendant to admit, pursuant to Rule 6.2 of the Customs Court Rules, that "the commission indicated on the entry documents was included as one of the elements of value in determining the appraised value of that entry." And defendant responded to this request under the rule with a categorical "Admitted."

Additionally, import specialist Harold O'Neil testified that the Stamp "Correction Approved" placed on the summary sheet in entry 401377 reflected the fact that the commission shown on the invoice was originally deducted by the broker as nondutiable in his calculation of entry value, but was added back on instructions from the entry clerk when the clerk rejected the entry and returned it to the broker for that purpose. And it was also brought out in the witness' testimony that after the court's initial decision in Concord I, Mr. O'Neil wrote on a transmittal and routing slip under date of December 17, 1973, directed to the Protest Section the words "appeal for reappraisement dismissed per RD 11744—6/1/71 Commission remains dutiable." (Exhibit 1.)

Plaintiff argues that this evidence establishes that the appraisements in Concord II are separable. Defendant disagrees.

The court agrees with plaintiff. In the court's opinion, defendant's response to plaintiff's request for admissions conclusively removes the question of separability from contention in the case.

The admitted matter indicates that the commission on the entry documents was included as one of the elements of value in determining the appraised value. By admitting this, defendant identifies a commission as an element included in the admittedly unitary appraised value. It matters not at this point, as defendant undertakes to argue, that the admission does not establish to what extent or in what sense the stated commission was included as an element of value. It is the function of the challenging party's evidence to ferret out the details relative to the identity and purpose of the commission. Cf. *United States* v. *Imperial Products, Inc.*, 65 CCPA 38, C.A.D. 1203, 570 F. 2d 337 (1978).

Admission practice under the court's rules requires that a party specifically admit or deny the matter or set forth the reasons why the answering party cannot truthfully admit or deny the matter. The documentary evidence noted substantiates the genuine character of the admission, and indeed, may well have been the inducement for the admission itself. The admission is binding on the defendant.

Since defendant admits that a commission constitutes an element of the appraised value, the appraisements in Concord II are separable. *H. M. Young Associates, Inc.* v. *United States*, 69 Cust. Ct. 155, 159, C.D. 4388 (1972), *aff'd*, 62 CCPA 20, C.A.D. 1138, 505 F. 2d 721 (1974). And plaintiff may challenge the dutiability of the commission without disturbing the presumptively correct appraisements as to the other elements.

With respect to the commission, Howard P. Ladd, plaintiff's former president, testified that plaintiff, on the basis of a 50-percent stock interest in the Hosho Corp. (down from complete control originally), utilized Hosho solely as a buying agent in connection with the importation of merchandise Concord acquired from various Japanese manufacturers with whom it negotiated directly. And Ladd's testimony is corroborated by reference to a buying agency agreement dated January 25, 1968, contained in a report of a regional customs representative bearing date of November 30, 1971 (exhibit 7). The agreement provides for a 1.3 percent commission to the Hosho Corp. And the source investigated in the report disclosed that Hosho acted only as a buying agent and received only a commission for its services.

Of particular interest in the regional representative's report is documentation in the form of sales notes and an invoice of one of the Japanese manufacturer's, namely Matsushita Electric Industrial Co.,

Ltd. Although these documents as reproduced in the report are mostly illegible, there is enough data on them to indicate the manufacturer's awareness of plaintiff's interest in the merchandise as buyer even though delivery is to be made to Hosho.

Also, there is the affidavit of B. Takahashi, dated January 12, 1970, the managing director of Matsushita Electric Trading Co., Ltd. of Tokyo, Japan, which was received in evidence in Concord I as exhibit 2. The Takahashi affidavit names plaintiff as purchaser of the merchandise and identifies Hosho as plaintiff's agent. And, in an invoice attached to the affidavit as exhibit A, the Hosho Corp. is designated as a buying agent of Concord Electronics Corp.

Other evidence in the record is to the same effect, namely, the affidavit of Mike Miyake, dated January 12, 1970, president of the Hosho Corp. which was received in evidence in Concord I as exhibit 1.

Defendant, who called no witnesses, has introduced no evidence indicative of the parties' participation in these transactions in a capacity different from that set forth in the evidence noted. Some question is raised by defendant relative to Hosho's activities as ranging beyond the duties of a buying agent in connection with inspection services.

In Concord II, Mr. Ladd testified that Hosho visited the factory where plaintiff was having merchandise made and inspected the merchandise before shipping. In Concord I, the Miyake affidavit states, in this connection, "We observe production of Concord goods and inspect them when ready for shipment to make certain that they meet Concord's specifications." But testimony of Mr. Ladd in Concord I is indicative of the superficial nature of this inspection service. On cross-examination Mr. Ladd testified (R. 39–40):

> Q. Do they inspect the merchandise for you?
>
> A. Yes.
>
> Q. I didn't notice that in the affidavit of Mr. Miyake. But they do inspect the merchandise for you, that's one of the things for which they are paid?
>
> A. At some factories, yes.
>
> Q. They "observe the production of Concord goods and inspect them when ready for shipment to make certain that they meet Concord's specifications." They didn't do too well when you had an $80,000 claim against Matsushita.
>
> A. It is very difficult to inspect the quality of merchandise. You have to design it in.
>
> Q. I didn't get that.
>
> A. Their inspection of a product doesn't guarantee that it's going to stand up in the field as a consumer product, and ours would not be the first company that had that type of problem.
>
> Q. Are you telling me that Concord was able to get Matsushita to give them an $80,000 adjustment on something which had a bad design, that didn't meet market specifications?

A. No. This actually was not Matsushita, it was another company. There was a product shipped in fairly large quantities which we shipped in turn, when we inspected, found it was satisfactory, shipped to the retailers around the United States. And there were many of them, after they were purchased by consumers, were defective and returned to the retailer, who in turn returned them to us and said, "This product is defective."

Q. What was the defect? Was it a factory defect?

A. It was a factory defect.

Q. Hosho couldn't determine that?

A. Hosho couldn't determine that due to the shipping of merchandise in climatic changes of variations, humidity, temperature, and vibration. The cabinets would deteriorate, some components deteriorated. The merchandise didn't perform in the field.

Q. As a matter of fact, you said that you didn't go to Hosho of Japan for a claim on this, but you went to the manufacturer?

A. Right.

On the evidence the court agrees with plaintiff that the record is clearly supportive of the existence of a bona fide buying agency which renders the underlying commission nondutiable. And the nondutiable status of the commission is not affected by the fact that it was paid in part for inspection services. As the court views the evidence the inspection services performed by Hosho were not of a quality control type affecting production of the merchandise, but rather were of the ordinary, garden variety post-production type that is commonly expected of a buying agent in the performance of its duties. Cf. *International Fashions* v. *United States*, 64 CCPA 35, 38, C.A.D. 1180, 545 F. 2d 138 (1976).

For the reasons stated, plaintiff has sustained the issuable allegations of the complaint relating to the commission. Consequently, defendant's motion to dismiss for failure of proof, made at the conclusion of plaintiff's case, is denied. And the court finds as facts:

1. That the merchandise in this action consists of tape recorders, parts, and other electronic equipment manufactured in Japan and exported therefrom between April 1970, and May 1971.

2. That said merchandise was appraised upon entry at the port of New York on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) at the total invoice values less bank interest charges.

3. That there is evidence in the record that the amounts shown on the invoices for "Our Commission" are a charge for a bona fide buying commission.

4. That defendant admits that the invoiced charge for "Our Commission" was included as an element of value in the appraisement of said merchandise.

Upon these facts the court concludes as matters of law:

1. That the appraisements herein are separable.

2. That export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b) of the Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) is the proper basis for determination of the value of the merchandise herein.

3. That said values are represented by the total invoice values less amounts shown on the invoices for bank interest charges and commissions.

Judgment will be entered herein accordingly.

(C.D. 4878)

J. E. MAMIYE & SONS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Tote bags

Court No. 78–6–01086

Importations of certain tote bags made of textile material were classified under item 389.60, TSUS (or as renumbered item 389.62 pursuant to Executive Order 11974), as modified by T.D. 68–9, held properly subject to classification under item 706.24, TSUS, as modified by T.D. 68–9.

"Handbags," as provided for in item 706.24, TSUS, is an eo nomine provision. This provision prevails over the basket provision for articles n.s.p.f. of textile materials both as to specificity and by virtue of headnote 1 of schedule 3, part 7, subpart B which excludes articles of textiles provided for elsewhere.

Use may be considered in determining the identity of an eo nomine designation. *United States* v. *Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959).

The record establishes the involved tote bags are used primarily by women as second handbags to carry items which do not ordinarily fit within a handbag. Such testimony is sufficient to establish the use of a tote bag to be similar to a handbag and as such removes it from the category of a shopping bag which would prevent classification under 706.24, supra. See Headnote 2(b) of schedule 7, part 1, subpart D.

[Judgment for plaintiff.]

(Decided October 31, 1980)

Mandel & Grunfeld (*Steven P. Florsheim* and *Robert B. Silverman* at the trial and on the briefs) for the plaintiff.

Alice Daniel, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Jerry P. Wiskin* and *Madeline B. Kuflik* at the trial; *Jerry P. Wiskin* on the brief), for the defendant.

FORD, Judge: This action presents for determination the proper classification of certain tote bags which were classified for duty purposes under item 389.60 (or item 389.62)[1] of the Tariff Schedules of the United States, as modified by T.D. 68–9, and assessed with duty at 25 cents per pound plus 15 per centum ad valorem.

Plaintiff contends said tote bags are properly dutiable at 20 per centum ad valorem as either handbags or, alternatively, as luggage of textile materials as provided for under item 706.24, TSUS, as modified by T.D. 68–9.

The pertinent statutory provisions read as follows:

Tariff Schedules of the United States:

Schedule 3, part 7, subpart B:

Subpart B headnote:

1. This subpart covers articles, of textile materials, not covered elsewhere in the tariff schedules.

* * * * * * *

Articles not specially provided for, of textile materials:

* * * * * * *

Other articles, not ornamented:

* * * * * * *

Of man-made fibers:

* * * * * * *

389.60	Other	25¢ per lb. + 15% ad val.

Schedule 7, part 1, subpart D:

Subpart D headnotes:

* * * * * * *

2. For the purposes of the tariff schedules—

(a) the term "luggage" covers—

(i) travel goods, such as trunks, hand trunks, lockers, valises, satchels,

[1] Item 389.60, TSUS, was renumbered item 389.62 by Executive Order 11974, dated Feb. 25, 1977.

suitcases, wardrobe cases, overnight bags, pullman bags, gladstone bags, traveling bags, knapsacks, kitbags, haversacks, duffle bags, and like articles designed to contain clothing or other personal effects during travel; and

(ii) brief cases, portfolios, school bags, photographic equipment bags, golf bags, camera cases, binocular cases, gun cases, occupational luggage cases (physicians', sample, etc.) and like containers and cases designed to be carried with the person, except handbags as defined herein;

(b) the term "handbags" covers pocketbooks, purses, shoulder bags, clutch bags, and all similar articles, by whatever name known, customarily carried by women or girls, but not including luggage or flat goods as defined herein or shopping bags;

* * * * * * *

Luggage and handbags * * *:

* * * * * * *

Of textile materials (except yarns, of paper), whether or not ornamented:

* * * Wholly or in part of braid------- * * *

* * * * * * *

	Other:	
	Of vegetable fibers and not of pile or tufted construction:	
* * * * * * *		
706.24	Other	20% ad val.

The record consists of the testimony of 8 witnesses called on behalf of plaintiff and 10 called on behalf of defendant. Fifty-three exhibits were received in evidence, 27 for plaintiff and 26 for defendant.

Mr. Jack Mamiye, president of plaintiff corporation, testified that he had been importing and selling handbags for approximately 30 years.

The line of merchandise handled by plaintiff consists of shoulder bags, tote bags and evening bags, which cover approximately 2,500 to 3,000 styles of which there are 1,000 styles of tote bags.

The imported tote bags consist of many variations in sizes, colors, and materials. Some of the tote bags had open tops, while others had zippers or snap closures, and some had inside or outside pockets. Mr. Mamiye testified that the letter designations on the invoices of the representative exhibits 1 to 5, indicated the various business concerns for whom they were imported. For example, "LG" represents Literary Guild, and "DB" represents Doubleday Book Club, etc.

Merchandise, such as exhibits 1 to 5, was sold to various premium customers and other accounts without the graphics. The latter tote bags were sold to handbag departments of department stores, notion departments, and cosmetic departments. The imported merchandise is commonly referred to as handbags, tote bags, shoulder bags, and cosmetic bags, as well as fashion handbags, fashion totes, and shoulder totes.

The witness testified that a tote bag with or without a zipper closure is still a tote bag or a handbag. The absence or presence of a closure is due solely to the customer's desire. The witness testified exhibits 1 to 5 were premium items, and he could only guess that they were probably sold like a gift with a purchase, I guess. I don't know.

The second witness called on behalf of plaintiff was Lou Nathan, an instructor at the New York Fashion Institute of Technology, where he teaches courses in handbag design and pattern making. Mr. Nathan is also a consultant to the handbag industry, and his duties involve supervision of handbag design, consulting on manufacturing operations and quality control.

The witness has been in the handbag business since 1930, having owned and operated a number of handbag manufacturing companies, as well as being employed by various handbag manufacturers. Mr.

Nathan has been involved in every facet of handbag design and manufacture and has personally designed and manufactured tote bags throughout his years in the handbag industry. He has written trade publication articles on the subject of handbags, as well as a textbook on handbag design and technology. He was familiar with the use of handbags in the United States and the manner in which handbags were sold at the retail level.

Mr. Nathan defined a handbag as something that women wear to carry their personal possessions while they are away from home. Based upon his experience, the witness testified that handbags fall into various price categories, such as, low, medium, or high. Handbags are also categorized by type, such as, frame bags, shoulder bags, underarm bags, clutch bags, box bags, evening bags, tote bags, travel bags, and hobo bags. In the opinion of the witness, a tote bag is a handbag utilized as an auxiliary handbag and is used to carry various objects which do not fit into a woman's regular handbag. It is, in effect, an auxiliary handbag. While a tote bag may be utilized for carrying purchases, such use is secondary because it is, in effect, a second handbag. By the same token, the witness testified that women may carry purchases in their regular handbag. In the opinion of Mr. Nathan tote bags are not sturdy versions of shopping bags and are not intended or designed to imitate shopping bags.

According to witness Nathan the concept of fashion plays an important role with respect to handbags, including tote bags. Fashion refers to color combinations, shape, and the manner in which the bag is carried, such as, hand, arm, or shoulder. From the standpoint of construction and use, exhibits 1 to 5 are similar to pocketbooks, purses, shoulder bags, and clutch bags.

On cross-examination, Mr. Nathan stated that women use handbags for carrying valuables and generally desire some form of security device in their primary handbag. The witness defined a shopping bag as a large paper or plastic bag, given away in a retail store. Such bags are used for carrying bulky purchases and are not used by women as a secondary handbag.

Mr. Nathan testified that he attended trade shows and that tote bags are displayed by handbag manufacturers as part of their collection.

Next called on behalf of plaintiff was Mr. Sharif El Fouly, manufacturer and designer of handbags, operating under the name of Sharif's Design, Ltd. The witness also teaches courses in handbag design, construction and pattern making at the Parsons Fashion Center, which is connected with the New School in New York City. After his arrival in the United States, he was employed by a handbag manufacturer from 1972 to 1978. The duties of this well-informed

witness included design, pattern making, quality control, buying of raw materials, as well as being in contact with retail buyers.

Prior to immigrating to the United States, the witness was involved in his family's handbag and luggage manufacturing business in Egypt. He obtained a degree in design from Offenbach in Germany and worked as a designer in the handbag industry in Europe. Witness El Fouly taught courses in handbag design in Lebanon, Jordan, and Morocco. He presently holds five foreign patents in handbag design. Mr. El Fouly regularly attends handbag trade shows and visits retail handbag establishments to observe how handbags are sold and merchandised. He has observed the uses of handbags throughout the United States since his arrival in this country in 1970. According to the witness, the use of a handbag does not vary geographically. Handbags are used mostly by women to carry their belongings, and it is not uncommon for women to carry two handbags at one time.

The witness has personally designed, manufactured, and sold tote bags, which come in all sizes, with and without closures. According to the witness some tote bags have inside or outside pockets and some do not. Such articles are made from various materials including leather, fabric, and plastic. Tote bags, in his opinion, are handbags and are usually sold and displayed in the handbag department of department stores. Larger tote bags are sold in the luggage department. Exhibits 1 to 5 are commonly referred to as tote bags and are not referred to as shopping bags. The tote bags, such as exhibits 1 to 5, are fashion bags because the colors, styles, designs, and proportions are geared to current fashions.

The witness was of the opinion that exhibits 1 to 5 are similar to pocketbooks, clutch bags, purses, and shoulder bags from the standpoint of construction and use.

On redirect examination witness El Fouly stated that tote bags can be used for shopping because they are usually large. However, the use of a handbag for carrying purchases does not change the identity from a handbag to a shopping bag since most large handbags can be used for shopping.

Deborah Patterson was then called on behalf of plaintiff. She testified that she had used tote bags similar to exhibits 1 to 5 for approximately 5 or 6 years. Such bags were used to carry her belongings, such as keys, money, and a change of clothes. On occasion she carried a second handbag in addition to her tote bag. The witness obtained a tote bag identical to exhibit 8 with the purchase of cosmetics in Bloomingdales, where it was placed in a paper bag and stapled shut. The witness further stated the cosmetics were not placed in the tote bag.

Michael Dimin, a wholesaler and distributor of plain and printed polyethylene shopping bags, was called by plaintiff. He defined a shopping bag as "* * * a bag whose primary function would be the transportation of goods from a point of sale to a point of use". Shopping bags are sold or given away by retailers and are used by both men and women. According to witness Dimin shopping bags fall under the category of packaging material, and, in his opinion, exhibits 1 to 5 are not shopping bags and are not competitive with his shopping bags.

Annemarie Androsiglio, a fashion coordinator for a women's wear manufacturer, was called on behalf of plaintiff and testified that she used a tote bag to carry her personal effects, such as, credit cards, keys, wallet, newspaper, and a folded shopping bag. She stated that while she placed purchases in her tote bag along with her personal effects, she did not use a tote bag to carry purchases only. She also carried on occasion an additional handbag along with her tote bag. In her opinion, a shopping bag is one used to carry merchandise home from a store and, once it served this function, she considered it to be a disposable item.

Rose Ann Avallone, called on behalf of plaintiff, testified that she had obtained exhibit 22 from the Doubleday Book Club. She stated that she used exhibit 22 while going to and from work, to carry personal effects such as an umbrella, a makeup case, hairbrush, a book or magazine, and sometimes her lunch. On occasion she has used exhibit 22 to carry a small purchase, but she has never used a tote bag for shopping or carrying only purchases. The witness further stated that she used a second handbag while going to and from work so she could carry all the personal effects that would not fit into one handbag. Witness Avallone stated that for leisure activities she used a different tote bag, in which she put all her personal effects, including keys, wallet, and money, and ordinarily did not carry another pocketbook on those occasions. According to the witness a shopping bag is primarily an inexpensive paper or plastic bag used to carry purchases home from a store.

Frieda Koren, an owner of a discount retail store in New York City, was called by plaintiff. Approximately 80 percent of her business consists of the sale of handbags and luggage. Witness Koren, prior to coming to the United States, designed handbags in her native country, Israel. She defined a handbag as a bag which is fashionable and stylish, that is carried by women, and is made of a nice material and looks nice. According to witness Koren exhibits 1 to 5 are handbags, and she sold bags that are identical to exhibits 1, 3, and 5 in her store. She further stated that she had sold exhibit 5 with and without the "LG" logo. The witness stated that she recognized no distinction between handbags and tote bags and that in transactions with retail customers

and suppliers, exhibits 1 to 5 are commonly referred to as handbags or tote bags. Witness Koren uses tote bags as second handbags to carry personal effects such as money, lunch, and keys. In her store she has sold paper and plastic shopping bags to customers desiring to carry out their purchases in a bag.

Defendant called Ann Sanchak as its first witness. She testified she did not own a bag similar to exhibits 1 to 5. Defendant offered, and it was received in evidence, exhibit N, which is the shopping bag belonging to Miss Sanchak, who testified she used said exhibit regularly for shopping. The witness further stated that she carries a handbag in addition to exhibit N, and that her valuables are carried in the handbag. When purchasing a handbag, she always selects one which has a zipper and compartments or some secure closure. In her opinion exhibits 1 to 5 are shopping bags and not handbags.

On cross-examination the witness conceded that the bag depicted in exhibit 13 is a handbag even though it had no closure.

Helen Vogel, an employee of the Lenox Hill Senior Center, was called by defendant and testified that she carries a tote bag to work daily. Her tote bag is similar to exhibit 1, only a little larger. The witness testified that she used a handbag to carry her valuables such as keys and papers and her tote bag for shopping and carrying personal effects such as books, boots, and an umbrella, and for carrying personal articles to the beach. The witness did not consider a tote bag to be a handbag because of a lack of security and would call her tote bag a shopping bag. Prior to owning a tote bag she used a shopping bag for carrying personal articles and shopping. Exhibits 1 to 5, according to witness Vogel, are shopping bags since they are open. On one occasion her tote bag was picked, and she lost her wallet and keys.

Defendant called Jo Harris, an import specialist with the Customs Service in Miami, Fla. The witness testified that she is familiar with exhibits 1 to 5 and owns one similar to such exhibits, which she produced. It was received in evidence as exhibit O. The witness testified she obtained exhibit O as a gift when she joined the Doubleday Book Club. She utilizes exhibit O on weekdays, going to work, when she places in it her newspaper, a large, bulky makeup kit, sometimes fruit or something to eat, reading material, and sometimes sewing or knitting. In addition, occasionally she may place in it a pair of shorts and slippers. Witness Harris then testified that these are not the types of articles she would carry in a handbag. In her handbag she carries items such as a wallet, keys, and other valuables. She considers her tote bag, exhibit O, as well as exhibits 1 to 5, to be shopping bags or tote bags. The witness further testified that her position in Customs did not include merchandise such as handbags or shopping bags.

Next called on behalf of defendant was Irwin Harold Gold, who is employed by the U.S. Customs Service as an import specialist in Chicago. The witness testified that he recently received an assignment to visit department stores in the Chicago area to make observations as to the sale of tote bags. He visited four department stores in that area and testified that in Wieboldt's Department Store articles similar to exhibit 1, but constructed similar to exhibit 5, were found in the cosmetics department. In Marshall Field's Department Store he observed an article similar to exhibit 3 in the notions department and on a counter across from the handbag department. In Montgomery Ward's Department Store he observed articles similar to exhibits 1 through 5 in between the notions and cosmetics department, and the stationery department. In his visits to Carson's Department Store and Sears Department Store, he observed no tote bags. However, in Marshall Field's Department Store in the Oak Brook Shopping Center, he observed a bag similar to exhibits 1 through 5 in the beachwear department. He also visited Horder's Stationery Store and observed articles similar to exhibits 1 to 5 displayed on a rack.

The witness further testified that he visited Kroch's and Brentano's bookshop, as well as the Dalton's bookstore, and observed articles similar to exhibits 1 through 5 displayed on a stand next to the cashier. The witness also visited five handbag shops and observed a tote bag made of burlap sack in only one of the stores.

Warner J. Heuman, chairman of the board of Uniflex Inc., manufacturers of plastic shopping bags, was called on behalf of defendant. The witness testified that he has observed articles such as exhibits 1 to 5 displayed at trade shows in which Uniflex merchandise was also displayed. The witness was of the opinion that a tote bag is one which is used to carry merchandise from one place to another, basically the same as a shopping bag. In his opinion, shopping bags and tote bags, such as exhibits 1 to 5, served the same purpose and were in direct competition with his shopping bags.

Mr. Heuman admitted that his corporation never designed, sold, or marketed tote bags such as those in issue and that his bags are constructed by a heat sealing or gluing process and are not sewn or made of a fabric material. He was of the opinion that a tote bag is a shopping bag and not a handbag. Plastic shopping bags, such as the merchandise manufactured by his company, fall into the category of flexible plastic packaging. Such bags are not designed as fashion accessories to clothing.

Edward J. Berrigan was called to testify on behalf of defendant. Witness Berrigan is a detective with the New York City Police Department, assigned to the pickpocket and confidence squad. The witness was of the opinion that exhibits 1 through 5 are not secure

from pickpockets since they are open. Detective Berrigan further testified that he had encountered cases where tote bags such as exhibits 1 through 5 had been the subject of pickpockets in which wallets and cosmetic cases were removed from the tote bags by thieves.

Samuel Roger Schoenfeld, a handbag designer and owner of a handbag marketing company, testified on behalf of defendant that he has been involved in the handbag industry since 1951. In the opinion of witness Schoenfeld, exhibits 2 to 5 are shopping bags and exhibit 1 is a handbag. The witness' sole distinction between a shopping bag and a handbag is that the latter must be secure. The witness testified that exhibits 2 to 5 are used along with a handbag to carry things that a woman might need, and that it is becoming more common for a woman to carry two handbags. According to the witness a handbag is one that is carried in the hand, such as a tote bag, either secured or unsecured, or a pocketbook.

Exhibit S was identified by Mr. Schoenfeld as a product he sells as a shopping bag. He was of the opinion that all tote bags are not handbags, but a tote bag with security is a handbag.

Witness Schoenfeld sold his merchandise to the handbag departments ar ' luggage departments of department stores. It was the opinion of the witness that exhibit 1 was a handbag because of the presence of a detachable purse. Mr. Schoenfeld further stated that exhibits 2 to 5 would not be considered shoulder bags or clutch bags in the trade.

Defendant called Roger Gerber, a manufacturer of cut and sewn products, whose company manufactures products similar to exhibits 1 to 5. The witness testified that his company displays its goods at trade shows, but not at handbag shows. In the experience of the witness in attempting to sell his products to department stores, he was directed to the notions and stationery departments. He characterized the tote bags manufactured by his company, exhibits T, U, and V, as primarily used for carrying purchased merchandise home from the store.

Nancy McTiernan, an import specialist employed by the Customs Service in New York, testified that bags similar to exhibit 2 are displayed in the cosmetics department of Bloomingdales. She further testified that she did not see exhibit 2 in the handbag department of Bloomingdales.

Based upon the record it is established the involved merchandise, represented by exhibits 1–5, consists of tote bags, made of a textile material. Said items were given away as premiums or sold. The provision claimed by plaintiff, handbags, is an eo nomine provision which if established would prevail over the provision under which classification was made. This is so since item 706.24 supra, is more

specific. Additionally, headnote 1 of schedule 3, part 7, subpart B, specifically excludes articles of textiles provided for elsewhere.

The primary issue presented is whether the imported tote bags are handbags as claimed or whether they are excluded from classification under item 706.24, supra, by virtue of being shopping bags in accordance with headnote 2(b) of schedule 7, part 1, subpart D. Alternatively, plaintiff claims the tote bags to be luggage under said item 706.24, supra. As indicated, supra, the provision for handbags is an eo nomine provision. An eo nomine designation is one which describes a commodity by a specific name, usually one well known to commerce. *United States* v. *Paul M. W. Bruckmann*, 65 CCPA 90, C.A.D. 1211, 582 F. 2d 622 (1978). Ordinarily use is not a criteria in determining whether merchandise is embraced within an eo nomine provision. However, use may be considered in determining the identity of an eo nomine designation. In *United States* v. *Quon Quon Company*, 46 CCPA 70, C.A.D. 699 (1959), the court, in determining whether rattancore articles were baskets or parts of furniture, made the following observation:

> While unhesitatingly granting the truth of the contention that baskets in the tariff act provides for baskets eo nomine, this does not help us in the least to decide whether the imported articles are baskets. We are not so trusting our own notions of what things are as to be willing to ignore the purpose for which they were designed and made and the use to which they were actually put. *Of all things most likely to help in the determination of the identity of a manufactured article, beyond the appearance factors of size, shape, construction and the like, use is of paramount importance.* To hold otherwise would logically require the trial court to rule out evidence of what things actually are every time the collector thinks an article, as he sees it, is specifically named in the tariff act. [Italic added, p. 73.]

Following this principle the record establishes that the involved tote bags are utilized by women as second handbags to carry items which do not ordinarily fit within a handbag. Defendant's witnesses, Schoenfeld, Harris, and Vogel confirmed the use of the tote bag to carry items which do not ordinarily fit within a handbag. Likewise plaintiff's witnesses, Patterson, Nathan, El Fouly, Androsiglio, Avallone, and Koren, testified to the same effect. Accordingly, it is apparent that, while a tote bag may be used to carry purchases, 9 of the 18 witnesses who testified indicated it is used for the convenience of carrying those items which do not fit within a handbag. Such testimony is sufficient to establish the use of a tote bag to be similar to a handbag and as such removes it from the category of a shopping bag which would prevent classification under item 706.24, supra. See headnote 2(b) of schedule 7, part 1, subpart D.

The court is aware of the language utilized in *Adolco Trading Co.* v. *United States*, 71 Cust. Ct. 145, C.D. 4487 (1973) which stated that

the articles enumerated by the TSUS as handbags have a closure to prevent valuable and small articles from falling out or from being stolen.[2] The court therein stated that handbags are used to carry money, licenses, credit cards, cosmetics, and other personal items. According to Detective Edward J. Berrigan, called on behalf of defendant, wallets and cosmetic cases are removed from tote bags such as exhibits 1 to 5 by pickpockets. These items are ordinarily found in a handbag. Defendant's witness Vogel additionally testified she had been a victim of a pickpocket, having lost a wallet from a tote bag. Whether or not the language with respect to a closure is dicta, the U.S. International Trade Commission in its publication, "Summary of Trade and Tariff Information," USITC Publication 841, Control No. 7–1–1, November 1977, made the following observation with respect to *Adolco:*

> A number of problems have arisen concerning the proper classification of imports of luggage for duty purposes. In C.D. 4487, November 29, 1973, the U.S. Customs Court ruled that, for Customs purposes, shopping bags are not classifiable as like articles designed to contain clothing or other personal effects during travel or like containers and cases designed to be carried with the person, except handbags as defined herein (in the TSUS). The court established certain dicta which now guide classification decisions. Especially important was the court's emphasis on a closure of some type for luggage which provides security for items contained therein and the use to which the article is put.
>
> However, certain types of totes do not have closures and often serve as a *second bag* for carrying articles in addition to a handbag or sometimes serve as a substitute for a handbag. Customs classifies a bag as a handbag, rather than luggage, if it is commonly known as, or sold, or used as a handbag, whether or not it has a closure. However, other totes which are not sold or used specifically as either luggage or handbags, have no closure, but are square in design and have a double handle are usually not classified as either luggage or handbags and are generally dutiable as an article not specially provided for according to the material of chief value. This can mean a substantially higher rate of duty than is applicable to luggage or handbags. It should be noted that this area of classification is still unclear and individual articles may be subject to a different classification from that described above. [Italic added, p. 5.]

Subsequent to the above the U.S. International Trade Commission issued USITC Publication 841, Control No. 7–1–8, p. 5, dated September 1980, "Summary of Trade and Tariff Information," covering handbags, and made the following statement:

> Another significant problem has been that of determining whether totes should be classified as handbags, luggage, or

[2] The court notes that defendant in its brief concedes the concept of a closure for a bag is a viable guideline, but it is not necessarily controlling.

articles, not specially provided for, of other materials. As pointed out in the *Summary of Trade and Tariff Information on Luggage* (USITC Publication 841, Control No. 7–1–1, November 1977) certain totes are classified as luggage. These bags generally have closures, clearly are designed for use during travel, and often are sold as part of a luggage set. To clarify this issue, the Customs Service published guidelines (C.S.D. 79–329, Dec. 27, 1978) as an aid in determining the proper classification of such bags, indicating they were not intended to be a definitive answer to every classification problem; rather, that they suggested an approach for dealing with handbags and totes. According to the guidelines, the characteristics of a handbag are as follows:

(a) Traditional handbags:

(1) Vary from small to large, the largest size is 14 inches in height, 12 to 14 inches in width, with no larger gusset than 3 inches (tapered gussets are up to 5 inches at the bottom). Some gussets are larger with this type of bag.

(2) Have one or more zippered wallet pockets for money and keys.

(3) Are compartmented (from one to four compartments).

(4) May or may not have outside pockets.

(5) Have flaps, zippered, or self-enclosures for the entire central portion of the body.

(6) Have hand and/or shoulder straps.

(b) Totes classified as handbags:

(1) The largest size is 14 inches in height, 12 to 14 inches in width, with no more than a 3-inch gusset.

(2) Must have a zippered wallet pocket (note item 7 for exception).

(3) May or may not have compartments.

(4) May or may not have outside pockets with or without closures.

(5) May or may not have a flap or other closure for the entire central portion of the bag body.

(6) Have hand and/or shoulder straps.

(7) The largest tote classified as a handb g without a zippered wallet pocket is 12 inches in height, 10 inches in width, and has a 3-inch gusset.

It is interesting to note that C.S.D. 79–329, referred to above, has the following introductory paragraph to the guidelines set forth, supra:

> The following guidelines are used by Customs to distinguish between handbags and totes. *These guidelines are intended to be used with flexibility*, as an aid in determining the proper classification of the merchandise. They *are not intended to be a definitive answer* to every classification problem; rather, they suggest an approach for dealing with handbags and totes. [Italic supplied.]

In the case at bar it is clear the involved tote bags are used primarily by women as handbags, as defined in headnote 2(b), schedule

7, part 1, subpart D, albeit a second handbag, and accordingly are properly subject to classification as such as claimed by plaintiff. In view of the foregoing, consideration of the luggage issue need not be reached.

Judgment will be entered accordingly.

(C.R.D. 80–7)

SOUTHWEST FLORIDA WINTER VEGETABLE GROWERS ASSOCIATION, ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, and WEST MEXICO VEGETABLE DISTRIBUTORS ASSOCIATION, INTERVENOR

Order on Plaintiffs' Motion To Release Documents Claimed To Be Privileged and on Defendant's Cross-Motion for Discovery Order

Court No. 80–4–00577

(Dated July 2, 1980)

MALETZ, Judge:

I. The court having considered:

(a) The letter of May 13, 1980 from C. Christopher Parlin, Acting Deputy Assistant Counsel of the Department of Commerce, to the clerk of the court, transmitting a portion of the administrative record in the case and stating in part:

> *Volume 11 contains national security information* and other privileged information. This volume should be safeguarded accordingly. [Emphasis in original.]

(b) Plaintiffs' motion to release documents claimed to be privileged; and

(c) Defendant's response to plaintiffs' motion and defendant's cross-motion that plaintiffs' motion be treated as a request for production of documents.

II. The court has determined that the quoted portion of the foregoing letter is an apparent claim of privilege. However, in no respect does it comply with the requirements for a proper claim of privilege.

III. It is therefore ordered that defendant shall file with this court, no later than July 31, 1980, a proper claim of privilege with respect to those documents, if any, contained in volume 11 of the administrative record for which defendant asserts a claim of privilege. Such claim of privilege shall include:

(a) An affidavit from the head of the applicable department or agency attesting that he has personally reviewed each of the documents for which a claim of privilege is made;

(b) A specific designation and description of each document for which a claim of privilege is made; and

(c) A demonstration of the precise and certain reasons for preserving the confidentiality of each document for which privilege is claimed.

IV. It is further ordered that defendant's cross-motion to treat plaintiffs' motion as a request for discovery be denied.

(C.R.D. 80–8)

INDUSTRIAL FASTENERS GROUP, AMERICAN IMPORTERS ASSOCIATION, PLAINTIFF *v.* THE UNITED STATES, HON. PHILIP M. KLUTZNICK, SECRETARY OF COMMERCE; HON. ROBERT E. HERZSTEIN, UNDER SECRETARY OF COMMERCE FOR INTERNATIONAL TRADE; HON. ROBERT E. CHASEN, COMMISSIONER OF CUSTOMS WASHINGTON, D.C., DEFENDANTS

Memorandum on Plaintiff's Motions for a Temporary Restraining Order and Preliminary Injunction: Countervailing Duties on Industrial Fasteners From India

Court No. 80–7–01157

(Dated August 20, 1980)

Barnes, Richardson & Colburn, Esqs. (*Andrew P. Vance*, Esq., of counsel), for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation, and *John J. Mahon*, trial attorney, Esqs., for the defendant.

NEWMAN, Judge: In a matter of novel impression, this court has issued for the first time a temporary restraining order (TRO) and preliminary injunction. These extraordinary remedies are now available by reason of significant changes made by the Trade Agreements Act of 1979 (Public Law 96–39, 93 Stat. 144, enacted July 26, 1979) in procedures for judicial review of administrative determinations in countervailing and antidumping cases. The main purpose of this memorandum is to call these injunctive orders of first impression and but one aspect of the expanded jurisdiction of the court to the attention of the international trade community.

Briefly, the facts and circumstances surrounding the issuance of the TRO and injunction are: In this action, plaintiff seeks review of

the final countervailing duty determination and order of the International Trade Administration, U.S. Department of Commerce, respecting certain industrial fasteners from India, published in the Federal Register on July 21, 1980 (45 F.R. 48607 et seq.). On April 30, 1980, pursuant to a preliminary countervailing duty determination (45 F.R. 28786 et seq.), the liquidations of certain entries of industrial fasteners from India were suspended. Following the final countervailing duty determination and order contested in this action, Customs issued orders on (or before) July 25, 1980, to commence liquidation of all entries which had been suspended on or after April 30, 1980, in accordance with the preliminary countervailing duty determination. In this context, plaintiff was faced with a critical problem—indeed, an emergency situation—on the eve of the impending liquidations ordered by Customs. It is questionable whether, apart from obtaining a judicial review of the Commerce Department's underlying final countervailing duty determination, importers would be entitled to file administrative protests against individual liquidations by Customs, and to contest any denied protests in this court. However, section 516A(c)(2) of the Tariff Act of 1930, as added by Public Law 96–39, 1979, supra, provides that the Customs Court may enjoin the liquidation of entries of merchandise covered by a determination of the administering authority (the International Trade Administration) upon a request by an interested party for such relief and upon a proper showing that the requested relief should be granted under the circumstances. Additionally, rule 19.1(b) of the Rules of the Customs Court provides for the issuance of a TRO under certain conditions.

In the present case, plaintiff has filed a summons, a verified complaint, and applications for a TRO and an injunction. In connection with plaintiff's applications, conferences were called by the court on July 28, 1980, and August 5, 1980; and a hearing was directed for August 7, 1980, at which oral argument was presented. Andrew P. Vance, Esq. represented the plaintiff association and Joseph I. Liebman, Attorney in Charge, Field Office for Customs Litigation, and John J. Mahon, trial attorney, Esqs. appeared on behalf of defendant. Also present at the first conference was Daniel A. Pinkus, Assistant Chief Counsel for Customs Court Litigation, U.S. Customs Service. Counsel for plaintiff adequately demonstrated that if protests against individual liquidations are not possible, enjoining liquidation of the entries was required to maintain the status quo and preserve the importers' right to judicial review, since without an injunction many entries would be liquidated prior to the time the courts could enter a final decision on the merits of the dispute. Any such liquidations would preclude plaintiff from obtaining the full benefit of a favorable ruling on Commerce's final countervailing duty determination.

Under the circumstances herein, the relief requested by plaintiff is appropriate; and furthermore, defendants have stated in open court that they do not object to the proposed order granting an injunction. Hence, this memorandum includes the TRO that was entered on July 28, 1980 (effective until Aug. 7, 1980), and a subsequent order granting an injunction entered on August 7, 1980 (effective during the pendency of this litigation in the Customs Court and its appellate tribunals).

This court emphasized at the hearing that it had no intention to impinge upon the jurisdiction of the Court of Customs and Patent Appeals. But plainly—and counsel for plaintiff conceded—if plaintiff were successful on the merits, and most certainly if plaintiff were not successful on the merits, plaintiff faced a perilous interval in the period after judgment rendered by the Customs Court and the taking of an appeal to the appellate tribunal and that court's action relative to a stay.

Parenthetically, Peter Buckfeller, Esq., attorney for the petitioner before the Department of Commerce (who has not yet intervened in this case as an interested party) was orally notified by this court of plaintiff's applications and of the hearing on August 7, 1980.

INDUSTRIAL FASTENERS GROUP, AMERICAN IMPORTERS ASSOCIATION, PLAINTIFF *v.* THE UNITED STATES, ET AL., DEFENDANTS

Court No. 80-7-01157

Temporary Restraining Order

(Dated July 28, 1980)

Upon reading and filing plaintiff's application for temporary restraining order, the affidavit of counsel in support of issuance of the temporary restraining order, the verified complaint and motion for preliminary injunction and memorandum in support thereof, and upon all other papers and proceedings had herein, including a hearing attended by counsel for the named parties, it clearly appearing—

(1) That immediate and irreparable injury, loss, or damage may result to the applicant before all possible interested parties or their attorney(s) can be heard in opposition to this application;

(2) That the injury suffered by the assessment of countervailing duties in accordance with a final countervailing duty determination and order (July 21, 1980, 45 F.R. 48607), in an amount equal to 18 percent of the f.o.b. for each particular entry, on all entries suspended pursuant to a preliminary countervailing duty determination (Apr. 30, 1980, 45 F.R. 28786) on industrial fasteners from India may be irreparable because such counter-

vailing duty assessment may not be susceptible to administrative protest and would be irrecoverable even if the determination by the International Trade Administration, Department of Commerce is held to be invalid by this court;

(3) That orders to liquidate suspended entries were issued by Friday, July 25, 1980, allowing liquidations of the entries in question to begin immediately, potentially causing the aforementioned irreparable harm;

(4) That importers, including members of the plaintiff trade association, may have no means of contesting the legitimacy of the countervailing duty assessments upon the liquidation of the subject entries; and

(5) That restraint of such liquidations will preserve the status quo until there is an opportunity to hold a hearing on the application for a preliminary injunction concurrently filed, and that such restraint will cause no harm to adverse parties, it is hereby

ORDERED that the defendants herein, together with their delegates and all other officers, agents, servants, and employees of the U.S. Customs Service shall be and they hereby are restrained from the liquidation of any and all entries or withdrawals from warehouse for consumption of certain industrial fasteners from India, which are subject to the final countervailing duty determination and countervailing duty order issued by the Commerce Department and published in the Federal Register on July 21, 1980 (45 F.R. 48607), until August 7, 1980, at time of hearing before the court; and it is

FURTHER ORDERED that defendants respond to plaintiff's motion for preliminary injunction by personal service on plaintiff's counsel on or before August 6, 1980 at 12 noon, and it is

FURTHER ORDERED that plaintiff's motion for preliminary injunction is set down for hearing before this court at 10 a.m. on August 7, 1980, and it is

FURTHER ORDERED that this order shall expire 10 days from the date of entry of same unless extended for good cause shown.

INDUSTRIAL FASTENERS GROUP, AMERICAN IMPORTERS ASSOCIATION, PLAINTIFF, *v.* THE UNITED STATES, ET AL., DEFENDANTS

Court No. 80-7-01157

Order

(Dated August 7, 1980)

Upon reading and filing plaintiff's motion for preliminary injunction, its memorandum of points and authorities in support of motion

for preliminary injunction, and the verified complaint; and upon defendants' oral representation to this court that they do not object to an order enjoining the liquidation of entries of certain industrial fasteners from India, covered by the countervailing duty determination and countervailing duty order published by the Department of Commerce on July 21, 1980 (45 F.R. 48607), during the pendency of this litigation; and it appearing to the court that preliminary injunctive relief is appropriate under the circumstances of this case;

And after hearing oral argument by Andrew P. Vance, Esq., on behalf of plaintiff, and by John J. Mahon, Esq., on behalf of defendants, it is hereby

ORDERED that the defendants herein, together with their delegates and all other officers, agents, servants, and employees of the U.S. Customs Service shall be and they hereby are enjoined during the pendency of this litigation in this Court and its appellate tribunals from the liquidation of any and all entries or withdrawals from warehouse for consumption of certain industrial fasteners from India, which are subject to the final countervailing duty determination and countervailing duty order issued by the Commerce Department and published in the Federal Register on July 21, 1980 (45 F.R. 48607).

(C.R.D. 80–9)

CONNORS STEEL COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Memorandum, Opinion and Order

Court No. 80–3–00478

(Dated September 3, 1980)

WATSON, Judge: This memorandum opinion concerns discovery sought by plaintiff, a domestic steel company, in furtherance of its action contesting an administrative determination that certain Belgian steel beams were not being sold in the United States at less than fair value.

By means of a request for production of documents and interrogatories, plaintiff sought business information submitted to the Customs service by the Belgian manufacturer and its subsidiary. The information was received under a pledge of confidentiality and is now in the possession of the Department of Commerce to which the sales-at-less-than-fair-value stage of antidumping proceedings were transferred. The information includes names of customers and details of particular sales transactions.

Defendant United States, honoring its pledge, has moved for a protective order barring disclosure on the ground that damage will

result to the business of those submitting the information. Defendant also argues that disclosure will discourage the submission of such information to the Government and thus impair the informational basis of the administration of the antidumping law. Plaintiff, relying on the relevance of the information has moved to compel discovery.

The court accepts the proposition that in the hands of a competitor the information in question can cause incalculable harm. The court also understands the desirability of encouraging the fullest possible submission of information to the administrative agencies charged with making determinations in the area of international trade. On the other hand, the court recognizes the necessity of allowing a party to fully prepare and present its legally authorized challenge to an administrative determination and to do so based on all available relevant material. In balancing these opposing considerations the most equitable solution appears to be to permit disclosure in a manner which will allow the information to be examined and utilized by the lawyers for plaintiff and designated experts for the purpose of this litigation but will forbid the further disclosure of the information to any other persons. In this regard the court relies on the lawyers, not as the alter egos of the plaintiff but as independent professionals and officers of the court.

In general, this approach conforms to the orders allowing disclosure of confidential information in *Pasco Terminals, Inc.* v. *United States*, 80 Cust. Ct. 249 (1978) and *Armstrong Brothers Tool Co., et al.* v. *United States*, 80 Cust. Ct. 252 (1978).

For the above reasons, it is

ORDERED, that plaintiff's motion to compel discovery be granted subject to the following terms:

1. The subject material shall be made available to counsel for plaintiff within 10 days of the entry of this order.

2. Counsel for plaintiff may disclose the material to the lawyers and office personnel working on the litigation.

3. No person to whom the material is disclosed shall at any time discuss or reveal the information to anyone except those authorized by this order.

4. No copies of the material shall be made except for the purposes of the litigation and as authorized in writing by counsel for plaintiff. A record of the authorizations shall be maintained, together with a log showing the pertinent details of the copying.

5. At the conclusion of the litigation the material shall be returned to counsel for defendant, together with all copies not utilized in court papers. The record of authorizations and copy log shall also be turned over to defendant at that time.

6. The terms of this order may be modified upon the consent of defendant or upon a further order of the court.

(C.R.D. 80–10)

ATLANTIC SUGAR LTD., ET AL., PLAINTIFFS *v.* THE UNITED STATES, DEFENDANT

Court No. 80–5–00754

Memorandum Opinion and Order Governing Access by Plaintiffs to Confidential Documents

(Dated September 12, 1980)

WATSON, Judge: This dispute regarding access to confidential documents arises in an action challenging the determination by the International Trade Commission (hereafter referred to as ITC), that importation of sugar from Canada was causing material injury to an industry in the United States. The action was commenced to seek judicial review of a final antidumping duty order under section 516A(a)(2) of the Tariff Act of 1930, 19 U.S.C. 1516 a(a)(2).

Plaintiffs, who are Canadian producers of refined sugar, seek access to certain documents which had been given confidential status by the ITC. The documents in contention consisted initially of a number of completed questionnaires submitted to the ITC by domestic sugar producers. The Government cross-moved for a protective order as to those documents. Amstar Corp., a domestic sugar producer whose petition initiated the administrative proceeding, intervened in this action and opposed plaintiffs' motion to the extent that it sought Amstar's answer to the questionnaire and other confidential documents containing information regarding Amstar's business operations. The plaintiffs withdrew their request for the completed questionnaires of other producers, leaving the disclosure of document 25 (Amstar's questionnaire) opposed by Amstar and the Government and the disclosure of documents 2, 3, 9, 10, and 11 opposed by Amstar. The latter documents contain information regarding financial performance, distribution, sales, and financial indicators for a number of domestic sugar producers, including Amstar. The information deals separately with the Northeastern States and other States.[1]

The court has examined the documents in camera and concludes that access to this information should be granted. See title 19, U.S.C. 1516a(b)(B). The details of the financial performance of domestic sugar producers and the data bearing on the existence of a regional sugar producing industry are important in determining whether there

[1] The court has also examined defendant's motion for protective order regarding other privileged documents included in the Administrative Record. An affidavit and claim of privilege by Mr. Bill Albergers Chairman of the ITC, has been filed in support of this motion. In view of plaintiffs' response to defendant', cross-motion for protective order the court understands that at this time there is no controversy as to these documents and this order shall not be deemed to cover the disclosure of the same.

was substantial evidence to support the determination of injury. The information also relates to the circumstances pertaining to the use of a "regional industry," as defined in 19 U.S.C. 1677(4)(c), rather than the domestic industry as a whole, for the purpose of determining injury. The court has not been persuaded that nonconfidential summaries of such material can be utilized for these purposes. Since the court is aware of the sensitive nature of a great deal of this information it therefore, adopts the terms and conditions of plaintiffs' proposed order. For the above reasons and upon careful consideration of plaintiffs' motion, the opposition by Intervenor Amstar Corp., the cross-motion for a protective order by the defendant United States, the response thereto by plaintiffs and all other pleadings and papers on file, it is hereby

ORDERED that plaintiffs motion be, and the same hereby is granted. It is further

ORDERED that the confidential documents numbered 2, 3, 9–11, 25, 42, 45–46, 49–50, 52, 56–57, and 61 in list No. 2, transmitted to the U.S. Customs Court in connection with this action, shall be available to counsel for plaintiffs for examination and copying at the office of the Clerk of this Court during the business days of the 30-day period commencing on the date of entry of this order, subject to the terms and conditions specified below.

1. All of the information not previously made publicly available contained in the confidential documents in list No. 2, "Confidintial documents transmitted to the U.S. Customs Court," shall be considered confidential.

2. Except as otherwise provided in this order, counsel for plaintiffs shall not disclose the confidential information to anyone other than their immediate office personnel actively assisting in this litigation.

3. Counsel for plaintiffs and their immediate office personnel shall neither disclose nor use any of the confidential information for purposes other than this litigation or (subject to continued safeguards to preserve confidentiality) any remand or appeal of this matter. Wherever used in this order, the term "this litigation" shall be deemed to include any remand or appeal resulting therefrom.

4. If, in the opinion of counsel for any party it becomes necessary to consult with experts independent of the industry involved in evaluating the confidential information, such experts shall agree not to disclose any of the confidential information to anyone other than to the counsel who consulted with them or to that counsel's office personnel, and then for purposes of this litigation only; any expert so consulted shall first sign a statement submitting themselves to the jusisdiction of the Customs Court and such reasonable sanctions as the Court may hold

appropriate in the event of a breach of the conditions of this protective order by them.

5. In no event shall disclosure of confidential information be made to in-house counsel or other representatives, agents, or employees of plaintiffs or the interested parties.

6. Counsel for plaintiffs shall maintain a record of any and all copies of confidential information made, to whom they are provided and when they are returned. All such copies shall be clearly labeled as containing confidential information and that they are to be returned at the conclusion of this litigation.

7. Any documents, including briefs and memoranda, containing any of the confidential information, which are filed with the court in this case, shall be conspicuously marked as containing information which is not to be disclosed to the public, and arrangements shall be made with the clerk of this court to retain such documents under seal, permitting access only to the court, court personnel authorized by the court to have access, and counsel for the parties. Copies of all the foregoing documents, but with the confidential information deleted, shall be filed with the court at the same time that the documents containing the confidential information are filed.

8. Any briefs or memoranda containing confidential information shall be served upon the other parties in a wrapper conspicuously marked on the front "Confidential"—to be opened only by (the name(s) of the attorneys handling the case): and shall be accompanied by a separate copy from which the confidential information has been deleted.

9. Upon conclusion of this litigation or any appeal or remand of this matter, counsel for plaintiffs and the interested parties shall (a) return all copies of the confidential documents obtained under this order and the record required to be maintained under paragraph 6 above, and (b) destroy all other documents (including documents held by persons authorized under this order to have access thereto) containing the confidential information.

10. Any reference to plaintiffs' counsel herein shall include any other interested party who may subsequently be granted access to such documents under protective order.

(C.R.D. 80-11)

SOUTHWEST FLORIDA WINTER VEGETABLE GROWERS ASSOCIATION, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND WEST MEXICO VEGETABLE DISTRIBUTORS ASSOCIATION, INTERVENOR

Court No. 80-4-00577

Order on Defendant's Motion for an Order Protecting Privileged Documents

(Dated September 12, 1980)

MALETZ, Judge:

I. Upon examination by the court in camera of each of the documents contained in volume 11 of the administrative record for which the Secretary of Commerce and the Secretary of the Treasury have claimed executive privilege, and upon consideration of defendant's motion for an order protecting these documents from disclosure to plaintiffs and plaintiffs' response thereto, it is hereby ORDERED:

A. That the court upon carefully weighing the Government's need in the public interest in maintaining the confidentiality of each of the following documents as to which the Secretary of Commerce and the Secretary of the Treasury have claimed executive privilege as against the need of the plaintiffs for these documents in prosecuting this action, and the court having concluded that the Government's need in maintaining the confidentiality of these documents outweighs the need of the plaintiffs in prosecuting the action, the court orders that the claim of executive privilege with respect to the following documents be sustained and that such documents shall not be disclosed to plaintiffs:

1. An undated memorandum from Under Secretary Solomon to Secretary Blumenthal re "Perishable Products and the Antidumping Law: An Update."

2. An undated memorandum from Robert H. Mundheim to C. Fred Bergsten re "Briefing memo for your meeting with Mexican Officials on Vegetable Case."

3. Memo for: C. Fred Bergsten
   From: John E. Ray
   Subject: U.S.-Mexico MTN Consultations Undated

4. Memo for: C. Fred Bergsten
   From: Gary C. Hufbauer
   Subject: Treatment of Perishable Products in Antidumping and Escape Clause Cases
   Dated: May 2, 1979

5. With the exception of the next to last paragraph of page 2:
Memo for: Under Secretary Solomon
From: Arnold Nachmanoff, Acting Assistant Secretary
Subject: U.S. Embassy Mexico's Concerns with Treasury Antidumping Investigation
Dated: June 12, 1979

B. That the court upon carefully weighing the Government's need in the public interest in maintaining the confidentiality of each of the following documents as to which the Secretary of Commerce and the Secretary of the Treasury have claimed executive privilege as against the need of the plaintiffs for these documents in prosecuting this action and the court having concluded that the need of the plaintiffs for these documents in prosecuting the action outweighs the Government's need in maintaining the confidentiality of the documents, the court orders that the claim of executive privilege with respect to each of the following documents be denied and that a true, accurate, and complete copy of each of such documents shall be made available to plaintiffs on or before September 19, 1980, under the terms of the protective order "Stipulation Governing Plaintiffs' Access to Vclumes 7–10 and 12–25," which was filed with the court in this case and was signed by the court on June 24, 1980:

1. A memorandum, dated May 1, 1979, from Lynn J. Barden/Linda F. Potts to Robert H. Mundheim re "Mexican Vegetables and Possible Amendment of ADA as it pertains to Perishables."

2. A memorandum, dated April 27, 1979, from Deputy Assistant Secretary Hufbauer to Secretary Blumenthal re "Perishable Products and the Antidumping Law; The Case Against Mexican Exports of Winter Vegetables."

3. A memorandum, dated May 25, 1979, from Assistant Commissioner (operations) to Commissioner of Customs re "Antidumping Investigation of Fresh Winter Vegetables from Mexico."

4. A draft memorandum, dated July 15, 1979, from Peter D. Ehrenhaft to Robert H. Mundheim re "Winter Vegetables from Mexico—Tentative Determination under Antidumping Act."

5. A draft memorandum, dated July 18, 1979, from Peter D. Ehrenhaft to Robert H. Mundheim re "Winter Vegetables from Mexico—Tentative Determination Under Antidumping Act."

6. An undated draft memorandum from Peter D. Ehrenhaft to Robert H. Mundheim re "Winter Vegetables from Mexico—Tentative Determination Under Antidumping Act."

7. A memorandum, dated July 16, 1979, from Commissioner of Customs to General Counsel re "Certain Fresh or Chilled Vegetables from Mexico."

8. A July 23, 1979 briefing paper by Peter D. Ehrenhaft re "Antidumping Proceeding Concerning Fresh Winter Vegetables from Mexico."

9. A September 28, 1979 "Significant Activity" memorandum from V. Kane to Division Director, reporting on a meeting held September 28.

10. An undated buckslip from Linda Potts to Bob Mundheim.

11. A draft memorandum, dated July 15, 1979, from Robert H. Mundheim to the Secretary re "Tentative Determination Under Antidumping Act in the Case of Mexican Winter Vegetables."

12. The next to last paragraph of page 2 of:

Memo for: Under Secretary Solomon
From: Arnold Nachmanoff, Acting Assistant Secretary
Subject: U.S. Embassy Mexico's Concerns with Treasury Antidumping Investigation
Dated: June 12, 1979

II. Upon examination by the court in camera of each of the documents contained in volume 11 of the administrative record for which the Secretary of State has claimed privilege and upon consideration of defendant's motion for an order protecting these documents from disclosure to plaintiffs and plaintiffs' response thereto, it is hereby ORDERED:

A. That the court having determined that there is a reasonable likelihood that disclosure of the following documents will be detrimental or injurious to the international relations of the United States, which outweighs the need of the plaintiffs in prosecuting this action, the court orders that the claim of privilege for such documents for national security reasons be sustained and that such documents shall not be disclosed to plaintiffs:

1. State Department cable 100396, dated April 21, 1979: Paragraph 1.

2. Mexico City cable 15561, dated September 11, 1979: Paragraph 2.

3. Letter from Ambassador Kreuger to the Secretary of Commerce, dated March 13, 1980: Enclosure 1 (diplomatic note from the Government of Mexico).

4. Mexico City cable 9175, dated June 2, 1979: Entire text.

5. Mexico City cable 9525, dated June 7, 1979: Entire text.

6. Mexico City cable 13475, dated August 9, 1979: Paragraphs 1, 2, and 3.

7. Mexico City cable 13985, dated August 17, 1979: Paragraphs 1, 2, 3, 4, and 5.

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8. Mexico City cable 15079, dated September 5, 1979: Paragraphs 1, 2, 3, and 4.

9. Mexico City cable 18295, dated October 24, 1979: Paragraphs 1, 2, 3, 4, and 5.

B. That the court upon carefully weighing the Government's need in the public interest in maintaining the confidentiality of each of the following documents as to which the Secretary of State has claimed executive privilege as against the need of the plaintiffs for these documents in prosecuting this action, and the court having concluded that the Government's need in maintaining the confidentiality of these documents outweighs the need of the plaintiffs in prosecuting the action, the court orders that the claim of executive privilege with respect to the following documents be sustained and that such documents shall not be disclosed to plaintiffs:

1. Letter from Ambassador Kreuger to the Secretary of Commerce, supra: Paragraph 2.

2. Letter from Ambassador Kreuger to the Secretary of Commerce, supra: Enclosure 2, Mexico City cable 4145, dated March 11, 1980: Entire text.

3. Mexico City cable 19796: Paragraph 1, last two sentences; paragraph 6, entire paragraph; paragraph 7, final sentence.

4. State Department cable 197561, dated July 30, 1979: Entire text.

5. Mexico City cable 13475, dated August 9, 1979: Paragraphs 4 and 5.

6. Mexico City cable 13985, dated August 17, 1979: Paragraph 6.

7. Mexico City cable 15079, dated September 5, 1979: Paragraph 5.

8. Mexico City cable 18295, dated October 24, 1979: Paragraph 6.

(C.R.D. 80–12)

BEDDY G. CURY, CURLY TOP, INC., MOVANT, *v.*
UNITED STATES, RESPONDENT

Memorandum Accompanying Order

Protest Nos. 1001–0–000678, etc.

(Dated September 15, 1980)

FORD, Judge: It appears from the papers filed in this matter that Mr. B. G. Cury, chairman and sole stockholder of Curly Top, Inc., advised the clerk of this court by letter dated July 24, 1980, that he

desired to bring an action in this court without the benefit of counsel. On July 29, 1980, Mr. Cury was advised by the chief deputy clerk of this court that the summonses were being returned since they were not in conformity with rule 3.2(a), which provides for a filing fee to be paid when the action is commenced. In addition, Mr. Cury was advised that rule 3.2(c) requires that, except in an action commenced by an individual in his own behalf, a summons must be filed by an attorney admitted to practice before the court. He was further advised that, if he felt aggrieved by the refusal of the clerk's office to accept the summonses as prescribed in rule 17.1(a) of the rules of this court, he may move to compel the clerk to accept the summonses by filing a motion to that effect pursuant to rule 4.12 and serve a copy of the motion upon respondent pursuant to rule 4.1.

Mr. Cury filed four separate letters together with summonses and checks representing the filing fees in which he requested the privilege to be heard and defend his position. The office of the clerk on August 18 advised Mr. Cury that it was considering his four letters as a motion to compel the clerk to accept the filing of the four summonses.

Respondent opposes the motion to compel the clerk to accept the filing on the basis that the movant corporation is required to bring an action by an attorney duly admitted to practice before this court as required by rule 16.3(e) of the rules of this court.

The case law on this subject is unequivocal in holding that a corporation can be represented in court only through an attorney at law. The decisions in this court and in the Court of Customs and Patent Appeals follow this principle. *S. Stern, Henry & Co.* v. *United States*, 48 Cust. Ct. 430 (1962), *aff'd*, 51 CCPA 15, C.A.D. 830 (1963), *cert. den.* 377 U.S. 909 (1964); *J. M. Altieri* v. *United States*, 58 Cust. Ct. 50, C.D. 2882 (1967), *aff'd*, 55 CCPA 104, C.A.D. 940 (1968); *R. G. Hobelmann & Co.* v. United States, 63 Cust. Ct. 80, C.D. 3878 (1969); *World Mart, Inc.* v. *United States*, 71 Cust. Ct. 164, C.D. 4490 (1973).

Similarly, other Federal courts have followed this principle. *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 830 (1824); *In re Victors Publishing Co.*, 545 F. 2d 285, 286 (1st Cir. 1976); *SEC* v. *Research Automation Corp.*, 521 F. 2d 585, 589 (2d Cir. 1975); *Shapiro, Bernstein & Co.* v. *Continental Record Co.*, 386 F. 2d 426, 427 (2d Cir. 1967); *Simbraw, Inc.* v. *United States*, 367 F. 2d 373, 374 (3d Cir. 1966); *Acme Poultry Corp.* v. *United States*, 146 F. 2d 738, 740 (4th Cir. 1944); *Ginger* v. *Cohn*, 426 F. 2d 1385, 1386 (6th Cir. 1970); *United States* v. *9.19 Acres of Land*, 416 F. 2d 1244, 1245 (6th Cir. 1969); *Strong Delivery Ministry Ass'n.* v. *Board of Appeals of Cook County*, 543 F. 2d 32, 33 (7th Cir. 1976); *In re Highley*, 459 F. 2d 554, 555 (9th Cir. 1972); *Devilliers* v. *Atlas Corp.*, 360 F. 2d 292, 294

(10th Cir. 1966); *Flora Construction Co.* v. *Fireman's Fund Insurance Co.*, 307 F. 2d 413, 414 (10th Cir. 1962), *cert. den.*, 371 U.S. 950 (1963). See also 19 A.L.R. 3d 1073.

Upon reviewing the papers the court notes the protests were denied on April 25, 1980, May 16, 1980, and two denials on July 25, 1980. The time within which to institute an action is governed by 28 U.S.C. 2631(a) and provides such action be filed within 180 days of such denial. Accordingly, in order to protect its rights, movant should obtain a counsel duly admitted to practice before this court and have the summonses filed within the appropriate times.

In view of the foregoing, movant's motion to compel the clerk to file the summonses relating to the protest numbers indicated on the annexed schedule is denied.

(C.R.D. 80–13)

ALBERTA GAS CHEMICALS, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Memorandum Opinion and Order on Plaintiff's Motion Brought on by an Order to Show Cause Why Sale of General Order Merchandise Should Not Be Enjoined

Court No. 79–8–01295

[Plaintiff's motion granted.]

(Dated September 22, 1980)

Freeman, Meade, Wasserman & Schneider (*Bernard J. Babb* of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch; *John J. Mahon* and *Glenn E. Harris*, trial attorneys, for the defendant.

NEWMAN Judge: We are faced again with the oft-litigated question of the Customs Court's equitable powers. In that connection, see my recent memorandum and orders in *Industrial Fasteners Group, American Importers Association* v. *United States, et al.*, 85 Cust. Ct. 108, C.R.D. 80–8, 495 F. Supp. 911 (Aug. 20, 1980), wherein this court for the first time issued a temporary restraining order and preliminary injunction in a matter of novel impression under section 516A(c)(2) of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979 (Public Law 96–39, 93 Stat. 144, enacted July 26, 1979).[1]

The issue now presented by plaintiff's motion, brought on by an order to show cause, is whether the Customs Court is empowered

[1] This provision empowers the Customs Court to enjoin the liquidation of entries in the case of a determination described in par. (2) of subsec. (a).

to grant injunctive relief pursuant to 28 U.S.C. 1651(a), commonly known as the "All Writs Act". That act provides:

> (a) The Supreme Court and all courts established by act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

I have concluded that the foregoing statute is applicable to the Customs Court and that injunctive relief may be granted under the facts and circumstances of this case.

Pursuant to plaintiff's motion, and after a conference attended by counsel for the parties, this court on August 13, 1980, issued an order to show cause returnable on August 20, 1980:

> Why an order should not be entered directing the Regional Commissioner at the Port of New York and all other officials and agents of the United States to maintain one shipment, consisting of 25x55-gallon drums of methyl alcohol imported by the plaintiff from Canada on August 14, 1979, and now being stored in the Mercantile Warehouse in Newark, N.J., under General Order No. 110–79, in its present status and unsold until 30 days after the decision of this court on the merits has become final.

The order to show cause further provides:

> Pending the hearing and determination of this motion and the entry of an order thereon, that all proceedings by the defendant, and any of its officers and agents in connection with the sale or other disposal of the merchandise or its removal from its present location, be, and is, hereby stayed by this court.

The above order to show cause, which was issued on the eve of the expiration of the 1 year general order period, was signed in the context of the following undisputed factual background.

On March 23, 1979, the Treasury Department (Treasury) determined that methyl alcohol from Canada is being, or is likely to be, sold at less than fair value (LTFV) within the meaning of section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. 160(a)). That determination was published in the Federal Register on March 30, 1979 (44 F.R. 19090).

On June 29, 1979, the U.S. International Trade Commission determined, in investigation No. AA1921–202, that an industry in the United States is likely to be injured by reason of the importation of methyl alcohol from Canada which Treasury had determined is being, or is likely to be, sold at LTFV. The Commission's determination was published on July 12, 1979 (44 F.R. 40734).

On July 23, 1979, Treasury issued a Finding of Dumping respecting methyl alcohol from Canada (T.D. 79–210), which finding was published in the Federal Register on July 27, 1979 (44 F.R. 44154).

The subject merchandise was exported from Canada on August 13, 1979. Entry documents (Customs form 7501)[2] and a check for esti-

[2] Consumption entry No. 79-039078-8.

mated duties were presented by plaintiff to the appropriate Customs officer at the Port of New York on August 15, 1979. However, the entry was rejected by Customs for the reason that the importer refused to proffer an antidumping bond (Customs form 7591) in accordance with 19 U.S.C. 167 and 19 CFR 153.50.

Further, on August 15, 1979, upon exclusion of the merchandise from entry, the merchandise was assigned General Order No. 110–79 and was placed in the Mercantile Warehouse, 1300 Newark Turnpike, Newark, N.J. The court has been advised by counsel that the merchandise presently remains stored in that warehouse.

On August 20, 1979, following the denial of its administrative protest, plaintiff commenced the present action contesting the Regional Commissioner's decision to exclude the merchandise from entry and his refusal to deliver the subject merchandise without the filing of an antidumping bond. The gravamen of plaintiff's action is that the Secretary's Finding of Dumping is illegal, null, and void; and that therefore the Regional Commissioner erred in demanding the posting of an antidumping bond, and in excluding the merchandise from entry and delivery to plaintiff in the absence of such bond. Plaintiff seeks an order directing the Regional Commissioner to accept plaintiff's entry and deliver the merchandise to plaintiff without filing an antidumping bond.

Defendant's motion to dismiss the action or alternatively for summary judgment was denied by this court on January 17, 1980. *Alberta Gas Chemicals, Inc.* v. *United States*, 84 Cust. Ct. 217, C.R.D. 80–1, 483 F. Supp. 303 (1980). There, it was determined that pursuant to 28 U.S.C. 1582(a)(4) this court has jurisdiction to determine the legality of the exclusion of plaintiff's merchandise from entry for refusal to file an antidumping bond, and of the Secretary's underlying finding of dumping. Defendant's alternative motion for summary judgment was held to be premature under rule 8.2(a) inasmuch as defendant had not then filed an answer. Defendant has since filed its answer to the complaint, and the action is presently pending before the court on cross-motions for summary judgment.

It appears from plaintiff's moving affidavit and attached documents that the merchandise has now been in a general order status for more than a year, and therefore is subject to sale at public auction as unclaimed and abandoned merchandise pursuant to 19 U.S.C. 1491 as amended;[3] that plaintiff has no intention of abandoning the sub-

[3] This statutory provision, so far as pertinent, reads: "Any entered or unentered merchandise (except merchandise entered under sec. 557 of this act [19 U.S.C. 1557], but including merchandise entered for transportation in bond or for exportation) *which shall remain in customs custody for 1 year from the date of importation thereof*, without all estimated duties and storage or other charges thereon having been paid, shall be considered unclaimed and abandoned to the Government and shall be appraised and sold by the appropriate customs officer at public auction under such regulations as the Secretary of the Treasury shall prescribe. * * *" [Italic added.]

See also 19 CFR, part 127.

ject merchandise, but rather is asserting a claim for its entry and delivery in the present action; and that plaintiff's efforts to obtain an informal agreement by Customs to continue holding the merchandise in a general order status until a decision in this litigation becomes final were not successful.[4]

On the return date of the order to show cause (Aug. 20, 1980) oral argument was heard by the court. Defendant did not oppose plaintiff's motion, conceding arguendo that if the court has subject matter jurisdiction (which defendant does not concede), the Customs Court has the power to grant the equitable relief sought by plaintiff under the All Writs Act (T. Oral Arg. 5). Thus, there is no dispute between the parties that the All Writs Act is applicable to the Customs Court under the circumstances of this case.

The Customs Court was established by an act of Congress on May 28, 1926, superseding the Board of General Appraisers.[5] 19 U.S.C. 405a. Moreover, in 1956, the Customs Court was declared to be a court established under Article III of the Constitution of the United States. 28 U.S.C. 251. Consequently, I have no doubt that Congress intended that the All Writs statute, 28 U.S.C. 1651(a), could be applied by this court in appropriate circumstances.

Although 28 U.S.C. 1651(a) refers to "all writs necessary or appropriate in aid of their respective jurisdictions", courts have interpreted the statute as authorizing injunctions to protect and effectuate their judgments. See *Baker* v. *Gotz*, 415 F. Supp. 1243, 1247 (D. Del. 1976), aff'd, 546 F. 2d 415 (3d Cir. 1976). Generally, the object of a preliminary injunction is to preserve the status quo until a full and final hearing on the merits. *Cywan* v. *Blair*, 16 F. 2d 279 (N.D. Ill. 1926). The Customs Court is a court of limited jurisdiction. Its authority to grant injunctive relief under 28 U.S.C. 1651(a) is strictly auxiliary in aid of its jurisdiction. Moreover, "(e)quity power can apply only to matters within a court's jurisdiction and cannot be exercised in disregard of the mandatory requirements of the jurisdictional statute". *United States* v. *Boe*, 64 CCPA 11, 18 (n.9), C.A.D. 1177, 543 F. 2d 151 (1976).

As aptly observed by Judge Watson in *Russell Stanfield Dexter* v.

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[4] A letter dated Aug. 11, 1980, from the Regional Commissioner of Customs at the Port of New York to plaintiff's counsel informed plaintiff that under the law (19 U.S.C. 1491) and regulations, the Commissioner had no administrative discretion to extend the 1 year general order period, and hence the merchandise would be scheduled for sale at the next regular sale occurring after Aug. 14, 1980.

[5] Significantly, Congress has before it historic legislation (S. 1654—entitled the "Customs Courts Act of 1979", and H.R. 7540—entitled the "Customs Courts Act of 1980"), providing inter alia for greatly expanding the jurisdiction of the Customs Court, changing the court's name to U.S. Court of International Trade, and granting to that court all of the powers in law and equity of, or as conferred by statute upon, a district court of the United States. These companion bills, respectively, were passed unanimously: S. 1654 on Dec. 18, 1979, and H.R. 7540 on this very day. The Senate and House versions are awaiting final congressional resolution before transmittal of the legislation to the President.

United States, 78 Cust. Ct. 179, 180, C.R.D. 77–1, 424 F. Supp. 1069 (1977):

> The All Writs Act does not give this court jurisdiction to require anyone to satisfy the preconditions of jurisdiction. *It only gives the court instruments with which to effectuate existing jurisdiction.* [Italic added.]

And in *Alberta Gas Chemicals, Inc.* v. *W. Michael Blumenthal, Secretary of the Treasury, et al.*, 82 Cust. Ct. 77, 88–89, C.D. 4792, 467 F. Supp. 1245 (1979), this court stated:

> Similarly, the All Writs Act, 28 U.S.C. 1651, also relied upon by plaintiff, does not give this court jurisdiction to grant plaintiff the requested relief, *but may only be utilized in aid of existing jurisdiction, that is to say, where the jurisdictional prerequisites of 28 U.S.C. 1582 are present.* [Italic added.]

See also: *Matsushita Electric Industrial Company, Ltd., et al.* v. *The United States Treasury Department et al.*, 67 Cust. Ct. 328, C.D. 4292 (1971), aff'd, 60 CCPA 85, C.A.D. 1086, 485 F. 2d 1402 (1973), cert. denied, 414 U.S. 821 (1973); *Flintkote Company, Glens Falls Division* v. *United States (Independent Cement Co., Party in Interest)*, 82 Cust. Ct. 305, C.R.D. 79–5, 467 F. Supp. 626 (1979); and *J. C. Penney Company, Inc.* v. *United States Treasury Department et al.*, 439 F. 2d 63, 68 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971).

Unlike the circumstances in the above-cited authorities wherein the courts declined to grant equitable relief pursuant to the All Writs Act, plaintiff here has not sought to use that act as a vehicle by which the court should exercise jurisdiction. Rather, plaintiff urged and this court heretofore decided in C.R.D. 80–1, that the present case has been properly brought to contest the denial of a protest against an administrative decision cognizable under 19 U.S.C. 1514(a)(4) and 28 U.S.C. 1582(a)(4); and that the court has jurisdiction to decide the issues pertinent to that administrative decision. The All Writs Act gives this court the power to grant the requested relief only in aid of, and in this situation, *in preservation of its jurisdiction.* The significance of this application of the All Writs Act lies in the obvious fact that the imported merchandise is the res of the action. Its sale at public auction by the Customs Service would make the merchandise unavailable for entry by, and delivery to plaintiff, in the event of a final decision on the merits favorable to plaintiff. Plainly, under such circumstances the fruits of litigation would be lost by a sale at public auction at this time, plaintiff would suffer irreparable harm, and such sale would render the issue before the court moot.

In sum, it is clear from the circumstances presented here, that the granting of the relief sought by plaintiff would maintain the advisable status quo, and is in aid of the court's jurisdiction. Such relief is

admittedly within the power of the court to grant, pursuant to the All Writs Act.

Lastly, the granting of injunctive relief pendente lite does not infringe upon 19 U.S.C. 1451, as any sale of the merchandise is merely suspended or deferred until after final determination of the merits of this litigation. It may be, as suggested by counsel for defendant, that during the period of restraint the subject merchandise may decline in value. A claim that injurious consequences will result to the Government if the general order merchandise is not promptly sold may not, of course, be disregarded by the court; nevertheless, it presents a question addressed not to the power of the court, but to its discretion or the propriety of the exercise of its power. Here, defendant's fear of a loss of value of the subject merchandise has been completely obviated by including in the proposed order—following this court's suggestion—a provision for security in an amount that has been mutually agreed upon by the parties.

For the reasons set forth herein, this court has entered the attached order (which has been jointly proposed by the parties), and this memorandum shall be deemed to be incorporated into and to supplement that order.

ORDER

Upon considering the motion of the plaintiff and the order of this court issued August 13, 1980, directing the defendant to show cause why this present order should not issue, and upon consideration of defendant's consent, upon the return of the order to show cause on August 20, 1980, to entry of this order; now, therefore, the court having found it is fully empowered so to command the defendant, it is hereby

ORDERED that, from and after this date and until 30 days after the decision in this case shall become final through the exhaustion or waiver of all rights of normal judicial review and appeal, the defendant United States shall not undertake to effect the sale or disposition, or the removal from warehouse or storage for such sale or disposition, of that certain merchandise the subject of this action which is more fully described in General Order No. 110-79 as 25x55-gallon drums of methyl alcohol, under assertion of right or duty pursuant to the provision of 19 U.S.C. 1491 or under any other provision or principle of law which might permit recoupment of Customs duties by such sale or disposition; *provided*, however and hereby so

ORDERED that, within 15 days after this date, the plaintiff furnish to the defendant a cash bond in the sum of $1,600 to secure the defendant's rights under law with respect to said merchandise; and *provided*, further that nothing contained in this order or the consent of the

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defendant thereto shall be construed as a relinquishment or waiver of defendant's previously asserted position that the court lacks subject matter jurisdiction of this action, or as a waiver of any right defendant may have at law or equity to recoupment of the full amount of the lawful duties eventually found due and owing with respect to the importation of said merchandise should the lien upon said merchandise (or the above bond in lieu thereof) not result in their full recovery.

(C.R.D. 80–14)

ATLANTIC SUGAR LTD., ET AL., PLAINTIFFS *v.* THE UNITED STATES, DEFENDANT

Memorandum Opinion and Order on Intervenor Amstar's Motion for Modification and Stay of Previous Order

Court No. 80–5–00754

(Dated September 24, 1980)

WATSON, Judge: On September 12, 1980, the court entered an order granting plaintiffs access to confidential documents from the administrative record of an antidumping proceeding filed in court by the International Trade Commission. Thereafter, Intervenor Amstar Corp. moved for a partial stay of the order and for a rehearing as to the disclosure of document 25, Amstar's response to an ITC questionnaire. Amstar sought a limitation of the disclosure of document 25 to one attachment and 3 of its 15 sections, and a further stay of disclosure of other documents covered by the order until all those persons whose confidential information was contained therein had been given notice of this proceeding and an opportunity to comment.

On September 23, 1980, the court heard oral argument of the above motion. Although the broad notice advocated by Amstar would be a perfect method of insuring that all possible objections to disclosure are heard, it is not presently required by law and has no constitutional dimension. When various persons responded to the questionnaires (from which the information subject to disclosure was evidently extracted) they were informed that the information would not be disclosed "except as required by law." The requirement of disclosure for the purpose of judicial review is such a requirement, even though it may not have been exactly foreseen at that time.

The court notes that under H.R. 7540 (the Customs Courts Act of 1980), which, as of this writing appears destined to go into effect on November 1, 1980, it will be required that interested parties be notified of the commencement of actions such as this one. However, in this "old law" case the court gives greater importance to the uninter-

rupted and expeditious continuation of this action in which issue has already been joined. Moreover, the court is of the opinion that possible harm to other persons by unauthorized disclosure will, in any event, be minimized by the adoption of a stringent protective order.

With regard to Document 25, the court is of the opinion that plaintiffs' need for it goes beyond mere curiosity or a vague groping for clues.

At this preparatory stage, to require plaintiffs to make an exact demonstration of how the contents of this document will support their attack on the administrative determinations would, in effect, require the court to make an advance judgment of the existence of substantial evidence for those determinations. Aside from demanding impossible prescience from the plaintiffs such an inquiry would result in a distorted and piecemeal judicial review.

The document contains 15 categories of information for the years 1975 through 1979, ranging from Amstar's production capacity, distribution of sales and profit and loss to its employment, wage, and price statistics. Some of the information is specifically related to the Northeast region, although most of it is stated in terms of overall operations in the United States, further divided into beet sugar and cane sugar operations. This data has an arguable relevance to the issues and it would be unreasonable to preclude its use as a basis for direct and inferential analysis.

The court adheres to its decision that plaintiffs should have access to Document 25.

For the above reasons, it is

ORDERED, that Amstar's motion for a modification of the previous order and for a further stay be denied and it is further

ORDERED, that the order of September 12, 1980, go into effect 5 days after the date of entry of this order.

(C.R.D. 80-15)

HENKEL CORPORATION, ET AL., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Memorandum Opinion and Order

Court No. 80-6-00910

(Dated October 8, 1980)

FORD, Judge: This matter is before the court by virtue of a motion by defendant for a protective order with respect to document No. 11 on list No. 2 of the administrative record.

The action was instituted under the provision of section 516A(2)(A) against a final negative determination by the U.S. International Trade Commission in a countervailing duty investigation on May 7, 1980, concerning dextrines and soluble or chemically treated starches derived from corn or potato starch from Belgium, Denmark, the Federal Republic of Germany, France, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom. Plaintiff on June 4, 1980, filed a request for injunction against the liquidation of all entries of such merchandise pending a decision on the merits. Defendant opposed said request for injunction which was denied on June 12, 1980.

The administrative record was filed with the court on July 28, 1980. On September 22, 1980, defendant moved for a protective order for document No. 11 on list No. 2 of the administrative record on the basis of privilege. Plaintiff on October 1, 1980, opposed this motion on the ground that it contained facts which should be discoverable.

Based upon the motion papers, and an examination by the court in camera, it appears that document No. 11 of list No. 2 consists of "pro and con" statements which the affidavit of Bill Alberger, Chairman of the U.S. International Trade Commission, states was reviewed by him and was found to consist of an internal communication prepared by the members of the Commission's staff, solely for the use of the Commissioners or staff. Said document comprises part of the process by which the Commission's decisions are formulated, but it may or may not reflect the ultimate view of the Commissioners or the Commission.

A proper claim of privilege having been asserted, the court finds the law on "pro and con" statements to be settled. Documents of this type were held to be the subject of a protective order on the ground of privilege in *SCM Corporation* v. *United States*, 82 Cust. Ct. 351, C.R.D. 79–11 (1979) and *Sprague Electric Company* v. *United States*, 81 Cust. Ct. 168, C.R.D. 78–18 (1978) and cases cited therein.

In *SCM*, Chief Judge Re succinctly summed up the rationale behind governmental privilege as follows:

> The privilege exists to encourage uninhibited and frank internal discussion in the formulation of governmental policy and decisionmaking. In the words of Mr. Chief Justice Burger, the privilege is necessary because "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances * * * to the detriment of the decisionmaking process." *United States* v. *Nixon*, 418 U.S. 683, 705, 94 S.Ct. 3090 (1974). See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 95 S.Ct. 1504 (1975). [P. 357.]

For the above reasons, it is

ORDERED that document No. 11, listed on list No. 2, part of the administrative record previously transmitted to the clerk of this court

in this case, is hereby recognized as a privileged document not subject to discovery or disclosure.

(C.R.D. 80-16)

ATLANTIC SUGAR, LTD., ET AL., PLAINTIFFS *v.* THE UNITED STATES, DEFENDANT, AMSTAR CORPORATION, INTERVENOR

Memorandum Opinion and Order

Court No. 80-5-00754

(Dated October 8, 1980)

WATSON, Judge: This is an action under 19 U.S.C. 1516a(a)(2) for judicial review of an administrative injury determination in a dumping investigation of Canadian sugar.

Defendant has moved for a protective order relieving it from answering plaintiffs' interrogatories. Defendant argues that this is a judicial review of an established administrative record in which interrogatories are inappropriate unless they are needed to correct an apparent incompleteness of the record. Plaintiffs argue that their questions are intended to "fill in gaps" in the record. However, the gaps to which it refers are not missing parts of the record but rather asserted inconsistencies or perceived deficiencies in the formulation and expression of the administrative rationale.

Accordingly, the interrogatories are really an attempt to force the defendant to clarify and justify the administrative determination. Discovery of that type goes outside the express limitation of this action to a review on the record. 19 U.S.C. 1516a(b)(1)(B).

Those instances of reviews on the record in which interrogatories were permitted were either cases of apparent incompleteness of the record as in *Tenneco Oil Co.* v. *Department of Energy*, 475 F. Supp. 299 (D. Del. 1979) or clear failures to articulate the administrative findings as in *Smith* v. *F.T.C.*, 403 F. Supp. 1000 (D. Del. 1975). Neither situation has been shown to exist here.

Accordingly, it is

ORDERED, that defendant's motion for a protective order is granted and it is further

ORDERED, that defendant is relieved from answering these interrogatories.

(C.R.D. 80–17)

CONNORS STEEL COMPANY, PLAINTIFF *v.* THE UNITED STATES, DEFENDANT

Memorandum Opinion and Order

Court No. 80–5–00478

(Dated October 10, 1980)

WATSON, Judge: This is an action brought to challenge a determination by the Secretary of the Treasury that certain steel I-beams from Belgium were not being sold in the United States at less than fair value. The action was brought under 19 U.S.C. 1516 (Supp. 1979) prior to its amendment by the Trade Agreements Act of 1979.

In an order of September 3, 1980 (*Connors Steel Co.* v. *United States*, 85 Cust. Ct. 112 C.R.D. 80–9), the court granted plaintiff's motion for access to confidential information in the administrative record. This information consisted in part of data regarding the sales of the Belgian manufacturer of the steel in question. Access was made subject to detailed restrictions, one of which provided that only the attorneys working on the case could see the material.

Plaintiff then moved to modify the order to allow it to disclose the material to Economic Consulting Services, Inc., so that they might analyze and verify calculations made by the Department of the Treasury. At that point, S. A. Cockerill (Cockerill) and Cockerill Stinnes Steel Corp. (CSSC), who are respectively, the producer and importer of the Belgian steel in question, were granted leave to appear in opposition. They argued that consultation with economic experts was unnecessary and posed an increased hazard of inadvertent disclosure.

The problem of further disclosure could probably be dealt with by appropriate protective terms and conditions but Cockerill appears to be correct in questioning whether a need exists for consultation with economic experts. On the question of access to these confidential materials, the court continues to balance the demonstrable needs of parties challenging the administrative determination and the legitimate concerns of those submitting confidential business information to the administrative agency.

At present the court does not see the need for anything beyond simple arithmetical use of the sales data of the Belgian manufacturer, and accordingly, is unwilling to modify its previous order. If, at some future time plaintiff is able to posit a reasonably complete line of argument involving the confidential data, and to demonstrate that the proper development of that line of argument requires the expertise

of economic consultants, then the court will reconsider its position. At that time the court will entertain a renewed written motion for modification with notice to Cockerill.

In the course of the hearing on this motion and in preceding papers the court has become aware of a sharp dispute regarding the scope of judicial review in this action. It is best that this matter be resolved so that the possible issues are identified as soon as possible. To this end the parties will be requested to brief the point.

It is therefore

ORDERED, that plaintiff's motion to modify the order of September 3, 1980, is denied, and it is further.

ORDERED, that within 30 days of the date of entry of this order the parties submit memorandums regarding the scope of judicial review in this action.

(C.R.D. 80-18)

ATLANTIC SUGAR, LTD., ET AL., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, AMSTAR CORPORATION, INTERVENOR

Memorandum Opinion and Order on Intervenor Amstar's Motion for Access to Documents

Court No. 80-5-00754

(Dated October 21, 1980)

WATSON, Judge: This is an action under 19 U.S.C. 1516a(a)(2) challenging the determination by the International Trade Commission that importations of sugar from Canada were causing material injury to an industry in the United States. Intervenor Amstar, a domestic producer of sugar and the initiator of the administrative proceeding, now moves for access to confidential documents from that proceeding to which the plaintiffs were previously granted access by the court. *Atlantic Sugar Ltd., et al.* v. *United States*, 85 Cust. Ct. 114, C.R.D. 89-10, modification and stay denied, 85 Cust. Ct. 128, C.R.D. 80-14.

Plaintiffs have not responded and the defendant United States objects only to the inclusion of Amstar's in-house counsel in the proposed order.

The court is of the opinion that in actions such as these the confidential business information of business competitors should not be disclosed to in-house counsel unless a party has no other reasonable way of adequately preparing and presenting its arguments. This preference is not based on any reservation as to the integrity of in-house counsel but is intended to avoid placing them under the unnat-

ural and unremitting strain of having to exercise constant self-censorship in their normal working relations.

It is therefore,

ORDERED, that Amstar's motion be granted only to the extent that its independent counsel shall be granted access to document Nos. 2, 3, 9, 10, 11, 25, 42, 45, 49, 50, 52, 56, 57, and 61 on list No. 2 under the terms of the court's order of September 12, 1980 and it is further

ORDERED, that the above-listed documents shall be made available for examination and copying by those granted access hereunder at the office of the Clerk of the Court or the office of the International Trade Commission for the 30-day period commencing on the date of entry of this order.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/108	Maletz, J. July 3, 1980	Shayne Knitwear, Inc.	76-9-02154	Item 382.58 37.5¢ per lb. +20% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/109	Maletz, J. July 3, 1980	Shayne Knitwear, Inc.	76-9-02157	Item 382.78 25¢ per lb. +32.5% (blouses and pants) Item 791.75 6% (jackets)	Item 791.75 6% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies 3-piece suits; entireties
P80/110	Maletz, J. July 3, 1980	Shayne Knitwear, Inc.	76-9-02169	Item 772.30 12.5% (jackets and pants) Item 382.58 37.5¢ per lb. +20% (vests) Item 382.78 25¢ per lb. +32.5% (shirts)	Item 792.30 12.5% Dutiable as entireties on basis of export value; said value is invoice unit price	J. C. Penney Purchasing Corporation v. U.S. (C.D. 4671)	New York Ladies sets; entireties
P80/111	Boe, J. July 3, 1980.	Enerco, Inc.	79-10-01506	Item 475.35 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Subzone 9A, Honolulu, from crude oil having the status of non-privileged foreign merchandise

P80/112	Boe, J. July 3, 1980	Hawaiian Independent Refinery	79–4–00650	Item 475.05 0.125¢ per gal. Item 475.10 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Sub-zone 9A, Honolulu, from crude oil having the status of non-privileged foreign merchandise
P80/113	Rao, J. July 14, 1980	F. W. Myers (Atlantic) & Co., Inc.	79–11–01749	Item 683.50 6.5% (shaver) Item 682.60 7.5% (charger)	Item 683.50 6.5% Dutiable as entireties; proper appraised value is $18.90 each, packed, less ocean freight and insurance	Judgment on the pleadings	New York Electric shavers with rechargeable batteries and their charging plugs; entireties
P80/114	Maletz, J. July 14, 1980	Nancy Sales Company, Inc.	76–7–01727	Item 546.52 50%	Item 546.35 20%	Agreed statement of facts	Boston Glass beer mugs
P80/115	Boe, J. July 15, 1980	Westinghouse Trading Corp.	78–4–00588	Item 535.10 22.5%	Item 535.14 15%	Judgment on the pleadings	New York Translucent alumina tubes
P80/116	Ford, J. July 28, 1980	Rohr Industries, Inc.	77–1–00003, etc.	Item 680.47 $1.12 ea. + 17.5%	Item 690.40 5.5%	Rohr Industries, Inc. v. U.S. (C.D. 4824)	Los Angeles Voith turbo transmissions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/117	Boe, J. July 28, 1980	Mobay Chemical Corp. et al.	75-2-00254	Item 406.70 20% (items marked "A") Item 409.00 7¢ per lb. + 45%; 6.3¢ per lb. + 40%; 5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%; 4¢ per lb. + 27%; 3.5¢ per lb. + 22.5% (items marked "B")	Item 405.25 1.4¢ per lb. + 9% (items marked "A") Item 406.70 24% (items marked "B")	Agreed statement of facts	New York White or black urethane pastes (items marked "A"); urethane pastes other than those described as black or white (items marked "B")
P80/118	Re, C.J. July 29, 1980	Kombi Ltd.	76-3-00626	Item 705.35 15% Item 705.58 25%	Item 734.97 9%	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, ski mitts or ski mittens
P80/119	Re, C.J. August 5, 1980	Kombi, Ltd.	77-12-04989	Item 705.35 15%	Item 734.97 Free of duty under GSP, by virtue of Ex. Order No. 11888 of 11/24/75	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, skimitts, or ski mittens; products of eligible beneficiary country

P80/120	Newman, J. August 12, 1980	Simmon Omega, Inc., et al.	72-3-00591, etc.	Items 722.16, 722.18, 722.34, 722.60, 722.64, 774.60, 657.20, 688.50 and 685.90 Various rates	Item 668.25 Free of duty	Simmon Omega, Inc. v. U.S. (C.D. 4815)	New York Photo-typesetting machines and parts and accessories thereof
P80/121	Boe, J. August 12, 1980	K-Mart Corp.	79-5-00689	Item 737.95 17.5%	Item A737.15 Free of duty pursuant to General Headnote 3(c) of TSUS, authorized by title V of Trade Act of 1974, and Ex. Order No. 11888 of 11/26/75	Agreed statement of facts	Longview (Portland, Oreg.) Models to a scale larger than 1 to 85 produced within Hong Kong
P80/122	Ford, J. August 19, 1980	Border Brokerage Co., Inc.	79-6-00992	Item 680.22 11%	Item 680.27 5%	Judgment on the pleadings	Blaine (Seattle) Uniflow valves
P80/123	Watson, J. August 19, 1980	Sunshine Cover and Tarp Inc.	80-5-00836	Item 380.62 25¢ per lb. + 15%	Item 735.20 10%	The Newman Importing Co., Inc. v. U.S. (C.D. 4648)	Los Angeles Nylon tents, size 7' x 7'
P80/124	Maletz, J. August 19, 1980	Granada Electronics, Inc.	79-10-01555	Item 735.20 10%	Item 734.20 Free of duty under GSP by virtue of Ex. Order No. 11888 of 11/24/75	APF Electronics, Inc. v. U.S. (C.D. 4784)	New York T.V. game machines; product of eligible beneficiary country

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/125	Newman, J. August 19, 1980	The Copeland Co., Inc., a/c Goyoung International, Inc.	79-4-00585	Item 734.77 7.5%	Item 734.77 Free of duty under GSP by virtue of Ex. Order No. 11888 of 11/24/75	Agreed statement of facts	Miami Golf gloves; product of eligible beneficiary country
P80/126	Newman, J. August 19, 1980	Tropical Customs Brokers, Inc., a/c Interbel Trading Co., Inc.	79-5-00787	Item 734.77 7.5%	Item 734.77 Free of duty under GSP by virtue of Ex. Order No. 11888 of 11/24/75	Agreed statement of facts	Miami Golf gloves; product of eligible beneficiary country
P80/127	Maletz, J. August 25, 1980	John V. Carr & Son, Inc.; Paccar Inc., d/b/a Dynacraft Company	78-3-00390	Item 772.65 4%	Item 772.66 Free of duty	John V. Carr & Son, Inc., et al. v. U.S. (C.D. 4652)	Port Huron (Detroit) Hose of rubber or plastics; Canadian articles and original motor vehicle equipment

P80/128	Richardson, J. August 26, 1980	Fairchild Semiconductor, A Division of Fairchild Camera and Instrument Corporation	73-4-00892	Item 687.00 10%, 8.5% or 7% on full value of imported merchandise Items 687.60/807.00 10%, 8.5% or 7% on full value of imported merchandise, less cost or value of U.S. products	Items 687.60/807.00 Cost or value of U.S. products deductible from value of imported merchandise; correct amount of duty as to each entry shown on exhibit 2 attached to decision and judgment as "Revised Duty"	U.S. v Texas Instruments Incorporated (C.A.D. 1178) General Instrument Corporation v. U.S. (C.A.D. 106.)	San Francisco American goods returned; semiconductors, transistors and/or integrated circuits containing U.S. fabricated components (silicon dice and gold wire)
P80/129	Newman, J. September 3, 1980	Veritas International, Inc.	77-6-01042	Item 700.60 20% (items marked "A", "B" and "C")	Item 700.45 10% (items marked "A") Item 700.55 6% (items marked "B") Item 700.83 8% (items marked "C")	Agreed statement of facts	Los Angeles Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/130	Richardson, J. September 9, 1980	Mattel, Inc.	73-2-00558, etc.	Items 737.90, 737.20, 737.25 or 737.30 Various rates without allowance under item 807.00	Items 737.90, 737.20, 737.25 or 737.30, and 807.00 Various rates upon full value of imported articles less value of U.S. fabricated components as set forth in schedule attached to decision and judgment	General Instrument Corporation v. U.S. (C.A.D. 1062) The Olga Company v. U.S. (C.D. 4468)	Los Angeles American goods returned; articles assembled abroad in part of fabricated U.S. components; toys
P80/131	Newman, J. September 9, 1980	Rhodia, Inc.	80-1-00156	Item 423.00 5%	Item 519.37 0.4¢ per lb.	Agreed statement of facts	New York Cerox 1610, rare earth oxide and cerox 1611 (artificial abrasives)
P80/132	Ford, J. September 12, 1980	Camel Manufacturing Company	77-7-01371	Item 338.30 13¢ per lb. + 22.5%	Item 355.82 12.5¢ per lb. + 15%	H. Rosenthal Co. v. U.S. (C.D. 4709, aff'd C.A.D. 1234)	Los Angeles Coated nylon taffeta
P80/133	Ford, J. September 29, 1980	J. O. Alvarez a/c Florafil, S.A.	70/925, etc.	Item 184.75 10% or 9%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers

P80/134	Ford, J. September 29, 1980	J. O. Alvarez a/c Florafil, S.A.	70/940, etc.	Item 184.75 10% or 9%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/135	Ford, J. September 29, 1980	J. O. Alvarez a/c Florafil, S.A.	72-7-01532, etc.	Item 184.75 9%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/136	Ford, J. September 29, 1980	J. O. Alvarez a/c Florafil, S.A.	72-7-01534, etc.	Item 184.75 8%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/137	Ford, J. September 29, 1980	J. O. Alvarez a/c Florafil, S.A.	73-2-00339	Item 184.75 8%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/138	Ford, J. September 29, 1980	J. O. Alvarez a/c Florafil, S.A.	73-2-00340, etc.	Item 184.75 8%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/139	Ford, J. September 29, 1980	Victor Cavazos a/c Desy Intl.	77-6-01004	Item 184.75 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/140	Ford, J. September 29, 1980	Joseph F. Hendrix a/c Florafil, S.A.	73-4-01071	Item 184.75 8% or 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico S.A. v. U.S. (C.D. 4809)	Presidio (El Paso) Dehydrated marigold flowers
P80/141	Ford, J. September 29, 1980	Joseph F. Hendrix a/c Prodcuctos Deshidratados De Mexico, S.A.	77-3-00460, etc.	Item 184.75 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Presidio (El Paso) Dehydrated marigold flowers

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/142	Ford, J. September 29, 1980	Joseph F. Hendrix a/c Desy International, Inc., et al.	77-12-04905, etc.	Item 184.75 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D.4809)	Presidio (El Paso) Dehydrated marigold flowers
P80/143	Ford, J. September 29, 1980	Joseph F. Hendrix a/c Desy International, Inc.	78-2-00242	Item 184.75 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, SA. v. U.S. (C.D. 4809)	Presidio (El Paso) Dehydrated marigold flowers
P80/144	Ford, J. September 29, 1980	Rettinger Raincoat Mfg. Co., Inc.	79-4-00080	Item 389.62 15% + 25¢ per lb.	Item A774.60 Free of duty	Agreed statement of facts	New York Woven polyethylene textile strips in c.v. of plastic (Tarps); product of beneficiary developing country.
P80/145	Ford, J. September 29, 1980	Barbara M. Todd a/c Special Nutrients, Inc.	67/88315, etc.	Item 184.75 10%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	San Diego Dehydrated marigold flowers
P80/146	Ford, J. September 30, 1980	Abbey Rents	78-11-01962	Item 727.55 10%	Item 692.10 3% (items marked "A") Item 692.27 4% (items marked "B") Item 727.06 4% (remaining mdse.)	Judgment on the pleadings	Los Angeles Electric wheelchairs and parts thereof

P80/147	Ford, J. September 30, 1980	Abbey Rents	79-4-00705	Item 727.55 10%	Item 692.10 3% (items marked "A") Item 692.27 4% (items marked "B") Item 727.06 4% (remaining mdse.)	Judgment on the pleadings	Los Angeles Electric wheelchairs and parts thereof
P80/148	Ford, J. September 30, 1980	Abbey Rents	79-5-00860	Item 727.55 10%	Item 692.27 or 727.06 4%	Judgment on the pleadings	Los Angeles Parts of electric wheelchairs
P80/149	Ford, J. September 30, 1980	J. O. Alvarez a/c Florafil, S.A.	73-2-00516	Item 184.75 8%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/150	Ford, J. September 30, 1980	J. O. Alvarez a/c Florafil, S.A.	75-12-03250	Item 184.75 8%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/151	Ford, J. September 30, 1980	Victor A. Camazos a/c Desy International	79-11-01683	Item 184.75 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/152	Ford, J. September 30, 1980	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A.	77-3-00455, etc.	Item 184.75 7.5%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Presidio (El Paso) Dehydrated marigold flowers
P80/153	Ford, J. September 30, 1980	Barbara M. Todd	72-5-01028	Item 184.75 10%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	San Diego Dehydrated marigold flowers

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/154	Ford, J. October 2, 1980	J. O. Alvarez	70/929, etc.	Item 184.75 10%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/155	Ford, J. October 2, 1980	J. O. Alvarez	70/939, etc.	Item 184.75 10%	Item 470.80 Free of duty	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	Laredo Dehydrated marigold flowers
P80/156	Richardson, J. October 15, 1980	The Budd Company, Trailer Division	77-9-02720, etc.	Item 692.27 Rates of duty varying between 4% and 6.5%	Item 202.58 Various rates of duty from 0.0% to 1.5%	Agreed statement of facts	Philadelphia "Laminated truck flooring"
P80/157 *	Newman, J. October 15, 1980	Keystone d/o Berkey Photo, Inc., et al.	72-8-01859, etc.	Item 722.34 10%	Item 722.75 4.5%	Agreed statement of facts	New York Photographic light meters and photographic meter assemblies
P80/158	Watson, J. October 27, 1980	Colonna & Co., Inc.	67/24614, etc.	Item 515.24 21%, 18.5%, 16.5% or 10.5%	Item 515.21 10.5¢, 9¢, 8¢ or 5¢ per cubic foot	Colonna & Co., Inc. v. U.S. (C.D. 4841)	New York Rough quarried travertine

* Amended 11/21/80, See Abs. P80/182.

P80/159	Watson, J. October 27, 1980	Colonna & Co., Inc.	67/81687, etc.	Item 514.57 50¢ or 45¢ per cubic foot (items marked "A") Items 515.24 21% or 18.5% (items marked "B")	Item 514.51 27.5¢ or 24¢ per cubic foot (items marked "A") Item 515.21 10.5¢ or 9¢ per cubic foot (items marked "B")	Colonna & Co., Inc. v. U.S. (C.D. 4841)	New York Rough quarried marble (items marked "A"); rough quarried travertine (items marked "B")
P80/160	Watson, J. October 27, 1980	Domestic Marble & Stone Corp.	67/24613, etc.	Item 515.24 21% or 14.5%	Item 515.21 10.5¢ or 7¢ per cubic foot	Colonna & Co., Inc. v. U.S. (C.D. 4841)	New York Rough quarried travertine
P80/161	Watson, J. October 27, 1980	Domestic Marble & Stone Corp.	67/71842	Item 514.57 50¢ per cubic foot (items marked "A") Item 515.24 21% (items marked "B")	Item 514.51 27.5¢ per cubic foot (items marked "A") Item 515.21 10.5¢ per cubic foot (items marked "B")	Colonna & Co., Inc. v. U.S. (C.D. 4841)	New York Rough quarried marble (items marked "A"); rough quarried travertine (items marked "B")
P80/162	Watson, J. October 27, 1980	Domestic Marble & Stone Corp.	67/81688, etc.	Item 514.57 50¢, 45¢ or 40¢ per cubic foot	Item 514.51 27.5¢, 24¢ or 22¢ per cubic foot	Colonna & Co., Inc. v. U.S. (C.D. 4841)	New York Rough quarried marble

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/163	Richardson, J. October 28, 1980	Herbert Winston Associates Inc.	79-9-01386	Item 386.50 14% (items marked "A" and "B")	Item A735.20 Free of duty pursuant to General Headnote 3(c) of TSUS, authorized by Title V of Trade Act of 1974, and Ex. Order No. 11888 of 11/26/75 (items marked "A") Item 735.20 10% (items marked "B")	Agreed statement of facts	New York Wrist and ankle weights produced within Taiwan (items marked "A"); wrist and ankle weights (items marked "B")
P80/164	Watson, J. October 28, 1980	Colonna & Co., Inc.	67/66583, etc,	Item 514.57 50¢, 45¢ or 25¢ per cubic foot	Item 514.51 27.5¢, 24¢ or 13.5¢ per cubic foot	Colonna & Co., Inc. v. U.S. (C.D. 4841)	New York Rough quarried marble
P80/165	Watson, J. October 28, 1980	World Famous Sales, Inc.	76-8-01810	Item 389.60 25¢ per lb.+ 15%	Item 735.20 10%	The Newman Importing Co. v. U.S. (C.D. 4648)	Boston Nylon backpacking tents
P80/166	Maletz, J. October 28, 1980	Spiegel, Inc.	76-1-00212	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Chicago Music boxes with revolving figures
P80/167	Ford, J. October 30, 1980	S. B. Penick & Company	77-3-00801, etc.	Item 184.75 7.5%	Item 470.85 4%	Joseph F. Hendrix a/c Productos Deshidratados De	New York Marigold extract

P80/167	Ford, J. October 30, 1980	S. B. Penick & Company	77-3-00301, etc.	Item 184.75 7.5%	Item 470.85 4%	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	New York Marigold extract
P80/168	Ford, J. October 30, 1980	S. B. Penick & Company	77-4-00624, etc.	Item 184.75 7.5%	Item 470.85 4%	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	New York Marigold extracts
P80/169	Ford, J. October 30, 1980	S. B. Penick & Company	78-2-00334, etc.	Item 184.75 7.5%	Item 470.85 4%	Joseph F. Hendrix a/c Productos Deshidratados De Mexico, S.A. v. U.S. (C.D. 4809)	New York Marigold extracts
P80/170	Richardson, J. October 30, 1980	Alltransport, Inc.	78-7-01249	Item 708.89 22.5%	Item 708.80 15%	Wild Heerbrugg Instruments, Inc. v. U.S. (C.D. 4767)	New York Microscopy phototubes
P80/171	Richardson, J. October 30, 1980	Calif. Custom Acc./Hawk, Division of Orion Industries	76-8-01785	Item 648.97 11%	Item 660.52 4%	Agreed statement of facts	Los Angeles Wing nuts
P80/172	Richardson, J. October 30, 1980	H. E. Lauffer Co., Inc.	77-1-00074-8	Item 533.66 10¢ per doz. pcs.+36% Item 533.65 10¢ per doz. pcs.+55%	Item 533.28 5¢ per doz. pcs. +10.5%	Agreed statement of facts	New York Earthenware or stoneware articles available in specified sets having the claimed values
P80/173	Maiets, J. October 30, 1980	Silvestri Art Mfg. Co.	76-5-01146	Item 737.80 22%	Item 725.50 8%	Amico, Inc. v. U.S. (C.A.D. 1214)	Chicago Music boxes
P80/174	Boe, J. October 30, 1980	Westinghouse Trading Corp.	78-6-01076, etc.	Item 536.11 22.5%	Item 535.14 15%	Westinghouse Trading Company v. U.S. (C.D. 4817)	New York Translucent alumina tubes
P80/175	Boe, J. October 30, 1980	Westinghouse Trading Corp.	79-5-00843, etc.	Item 536.11 22.5%	Item 535.14 15%	Westinghouse Trading Company v. U.S. (C.D. 4817)	New York Translucent alumina tubes

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ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/218	Maletz, J. July 3, 1980	Petrie Stores Corp.	76-6-01458	Export value	Appraised values less only the 7% buying commissions included in said appraised values	Agreed statement of facts	New York Wearing apparel
R80/219	Re, C.J. July 14, 1980	Marubeni America Corp.	76-1-00262	Export value	Unit values found by appraising customs official, less ocean freight and marine insurance, without additions to said values for currency fluctuation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Fabric
R80/220	Boe, J. July 14, 1980	Gehrig, Hoban & Co., Inc.	R69/29	United States value	Determine by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Los Angeles Machine tools and a c cessories and parts thereof

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/221	Newman, J. July 15, 1980	Gehrig, Hoban & Co., Inc.	R69/7475, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/222	Boe, J. July 15, 1980	Sabrina Knits Ltd. et al.	76-5-01306, etc.	Constructed value	Invoice unit values plus an additional 5% of costs for materials and for shipping materials from place of manufacture of materials to place of manufacture of finished imported product (Hong Kong)	Agreed statement of facts	New York Wearing apparel
R80/223	Boe, J. July 28, 1980	Federal Pacific Electric Co.	78-12-02282	Export value	Invoice unit prices, net packed, as set forth in entries and invoices	Agreed statement of facts	Buffalo Switches, switchboard parts and relays
R80/224	Boe, J. July 28, 1980	Uniroyal, Inc.	78-10-01770	American selling price	$5.25 per pair, less 2%, net, packed	Agreed statement of facts	Los Angeles Footwear for children and juniors

R80/225	Re, C.J. July 29, 1980	Holly Stores, Inc.	76-12-02740	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R80/226	Re, C.J. July 29, 1980	S. S. Kresge Co.	74-5-01190, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R80/227	Re, C.J. July 29, 1980	S. S. Kresge Co.	77-5-00712, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Longview (Portland, Oreg.) Wearing apparel, etc.
R80/228	Newman, J. July 29, 1980	Gehrig, Hoban & Co., Inc.	R69/3348, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/229	Newman, J. July 29, 1980	Gehrig, Hoban & Co., Inc., a/c Charmilles Corp. of America, and Frank P. Dow Co., Inc., a/c Charmilles Corp. of America	71-8-00676	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York; Portland, Oreg. Machine tools and accessories and parts thereof
R80/230	Boe, J. July 29, 1980	Charmilles Corp. of America	78-4-00649, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Los Angeles Machine tools and accessories and parts thereof

R80/231	Boe, J. July 29, 1980	Federal Pacific Electric Co.	76-5-01290	Export value	Invoice unit prices, net packed, as set forth in entries and invoices	Agreed statement of facts	Buffalo Switches, switchboard parts and relays
R80/232	Re, C.J. August 4, 1980	Adorence Co., Inc.	73-3-00819, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/233	Re, C.J. August 4, 1980	CBS Imports Corp.	73-6-01631, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/234	Re, C.J. August 4, 1980	CBS Imports Corp.	73-12-03475, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles

[1] Decision and judgment vacated and set aside by order of the court entered Aug. 13, 1980. See reappraisement abstract No. R80/260 for decision and judgment entered on Aug. 13, 1980.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/235	Boe, J. August 4, 1980	Fisher-Voith Plastics, Machines, Inc.	77-2-00241	Export value	Invoice unit price of merchandise, net packed, less included ocean freight	Agreed statement of facts	Cleveland Injection blow molding machines
R80/236	Re, C.J. August 5, 1980	Adorence Co., Inc.	73-8-002234, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles, Long Beach Various articles
R80/237	Re, C.J. August 5, 1980	Adorence Co., Inc.	74-1-00231	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles, Long Beach Various articles
R80/238	Re, C.J. August 5, 1980	Adorence Co., Inc.	74-5-01321	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles, Long Beach Various articles
R80/239	Re, C.J. August 5, 1980	Himalaya, Inc.	74-5-01318, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles

R80/240	Re, C.J. August 5, 1980	Holly Stores Inc.	76-6-01459	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R80/241	Re, C.J. August 5, 1980	Korvettes, Division of Arlen Realty & Development Corp.	74-8-02238, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/242	Re, C.J. August 5, 1980	Rotterdam Nuclear B.V., et al.	77-12-04808	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New Orleans Various articles
R80/243	Boe, J. August 5, 1980	Bus and Truck Supply Co.	76-9-02145	Export value	$54,875.00 per bus, plus or minus any increases or reductions in above price, due to addition or elimination of various parts, less 10%, less value of components of U.S. origin allowed on liquidation plus value of any Michelin tires included in shipments	Agreed statement of facts	New Orleans Inter-city passenger buses
R80/244	Boe, J. August 5, 1980	Conti Rubber Products Inc.	76-2-00505, etc.	Foreign value	Claimed unit values (all in Deutsche mark) as listed on schedule attached to decision and judgment	Agreed statement of facts	Jacksonville (Tampa) Various automotive tires

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/245	Boe, J. August 5, 1980	Conti Rubber Products Inc.	76-4-00971, etc.	Foreign value	Claimed unit values (all in Deutsche mark) as listed on schedule attached to decision and judgment	Agreed statement of facts	Baltimore Various automotive tires
R80/246	Boe, J. August 5, 1980	Conti Rubber Products Inc.	76-4-00973, etc.	Foreign value	Claimed unit values (all in Deutsche mark) as listed on schedule attached to decision and judgment	Agreed statement of facts	Chicago Various automotive tires
R80/247	Boe, J. August 5, 1980	Conti Rubber Products Inc.	77-3-00486, etc.	Foreign value	Claimed unit values (all in Deutsche mark) as listed on schedule attached to decision and judgment	Agreed statement of facts	Seattle Various automotive tires
R80/248	Boe, J. August 5, 1980	Conti Rubber Products Inc.	78-6-00967	Foreign value	Claimed unit values (all in Deutsche mark) as listed on schedule attached to decision and judgment	Agreed statement of facts	Boston Various automotive tires

R80/249	Boe, J. August 5, 1980	Federal Pacific Electric Co.	78-5-00882	Export value	Equal to invoice unit prices, net packed	Agreed statement of facts	Buffalo Switches, switchboard parts and relays
R80/250	Boe, J. August 5, 1980	Federal Pacific Electric Co.	79-8-01267	Export value	Equal to invoice unit prices, net packed	Agreed statement of facts	Buffalo Switches, switchboard parts and relays
R80/251	Boe, J. August 5, 1980	J. C. Penney	R61/514, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Norfolk Gloves and sweaters
R80/252	Re, C.J. August 12, 1980	Adorence Co., Inc.	74-11-03269	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles, Long Beach Various articles
R80/253	Re, C.J. August 12, 1980	Korvettes, Division of Arlen Realty & Development Corp.	74-4-01063, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/254	Watson, J. August 13, 1980	Sandoz, Inc., et al.	R66/3102, etc.	United States value	U.S. selling prices, less 1% cash discount as determined by Customs officer at time of appraisement; less amounts shown in column III of "Schedule of Appraisement and Claims," attached to decision and judgment, which represent profit and general expenses usually made in U.S. on sales of dyestuffs of same class or kind; less costs of transportation and insurance from place of shipment to place of delivery in amounts determined by Customs officer at time of appraisement; divided by 1.40 or such other factor applied by Customs officer, to allow for Customs duties payable on imported dyestuffs.	U.S. v. Geigy Chemical Corporation et al. (C.A.D. 1155)	New York Benzenoid dyestuffs

R80/255	Newman, J. August 13, 1980	Castelazo & Associates	R69/5975, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Los Angeles Machine tools and accessories and parts thereof
R80/256	Newman, J. August 13, 1980	Charmilles Corp. of America	R70/7424, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/257	Newman, J. August 13, 1980	Charmilles Corp. of America	R70/8791	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/258	Newman, J. August 13, 1980	McClary, Swift & Co., Inc.	R70/9400, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Seattle Machine tools and accessories and parts thereof
R80/259	Boe, J. August 13, 1980	Charmilles Corp. of America	76-10-02251	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value, for entries covered by schedule A, attached to decision and judgment, at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), and for entries covered by schedule B, attached to decision and judgment, at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof

R80/260 [1]	Boe, J. August 13, 1980	Charmilles Corp. of America	78–4–00649, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value, at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Los Angeles Machine tools and accessories and parts thereof
R80/261	Watson, J. August 19, 1980	Toby Tex Inc.	80–1–00067	American selling price	$2.50 per pair net packed	Converse Rubber Company v. U.S. (R.D. 11716)	New York Footwear
R80/262	Newman, J. August 19, 1980	Brother International Corp.	R65/24882, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Longview (Portland, Oreg.) Sewing machine and console
R80/263	Newman, J. August 19, 1980	Mitsui & Co. (USA), Inc.	78–4–00617	Cost of production	Invoice unit prices, less any included freight and insurance, in amounts shown on entry papers, net, packed	Judgment on the pleadings	Los Angeles Lathes
R80/264	Newman, J. August 19, 1980	J. C. Penney	R64/10452, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	Philadelphia Tubing mats

[1] An order entered on Aug. 13, 1980, vacated and set aside the decision and judgment entered in this action on July 29, 1980 (reappraisement abstract No. R80/230).

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/265	Newman, J. August 19, 1980	J. C. Penney	R64/12293, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Philadelphia Tubing mats
R80/266	Newman, J. August 19, 1980	J. C. Penney	R64/13428, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Portland, Oreg. Tubing mats
R80/267	Newman, J. August 19, 1980	J. C. Penney	R64/14154, etc.	Export value	Appraised unit values less 7.5%, net packed	Agreed statement of facts	New Orleans Tubing mats
R80/268	Re, C.J. August 25, 1980	Amerex Trading Corp.	73-7 01858	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Charleston, S.C. Merchandise covered by involved entries
R80/269	Re, C.J. August 25, 1980	Korvettes, Division of Arlen Realty & Development Corp.	73-5-01316	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise covered by involved entries
R80/270	Ford, J. August 25, 1980	B & K Instruments, Inc.	R65/25195, etc.	Export value	Invoice unit prices less, where applicable, the items specified on invoices as saved packing	Agreed statement of facts	Cleveland Items specified on schedule A, attached to decision and judgment

R80/271	Richardson, J. August 25, 1980	Polaroid Corporation	77-2-00212, etc.	Cost of production	$1.423 per roll	Agreed statement of facts	Boston; New York T20C Photographic roll film for Polaroid cameras
R80/272	Re, C.J. August 26, 1980	Adorence Co., Inc.	73-12-03479	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise covered by involved entries
R80/273	Re, C.J. August 26, 1980	Adorence Co., Inc.	77-3-00513, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise covered by involved entries
R80/274	Re, C.J. August 26, 1980	Adorence Co., Inc.	78-2-00351, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise covered by involved entries
R80/275	Re, C.J. August 26, 1980	Korvettes Division of Arlen Realty & Development Corp.	73-4-01065, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise covered by involved entries

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/276	Re, C.J. September 3, 1980	CBS Imports Corp.	74-5-01317, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/277	Re, C.J. September 3, 1980	Stanton-Kutasi Company	74-2-00410	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included in appraised value which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Various articles
R80/278	Newman, J. September 9, 1980	Charmilles Corp. of America	77-8-02285, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at fixed rate of exchange as shown on special customs invoice in entry documents (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/279	Newman, J. September 9, 1980	Gehrig, Hoban & Co., Inc.	R70/1769, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the	Agreed statement of facts	New York Machine tools and accessories and parts thereof

					"claimed value"), 53% of difference between claimed value and appraised value		
R80/280	Newman, J. September 9, 1980	North American Car Corporation	80-1-00170	Export value	$4,725,421 of which $824,-098 is free of duty under item 807.00, TSUS and $3,901,323 is subject to duty at 18% under item 690.15, TSUS	Agreed statement of facts	Laredo Railroad freight cars
R80/281	Newman, J. September 9, 1980	North American Car Corporation	80-1-00171	Export value	$3,540,106 of which $604,-042 is free of duty under item 807.00, TSUS and $2,936,064 is subject to duty at 18% under item 690.15, TSUS	Agreed statement of facts	Laredo Railroad freight cars
R80/282	Newman, J. September 9, 1980	Sherriff-Guerringue, Inc.	R70/9454, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Seattle Machine tools and accessories and parts thereof
R80/283	Boo, J. September 12, 1980	Conti Rubber Products, Inc.	74-11-03185, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Tampa Various automotive tires

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DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/284	Re, C.J. September 30, 1980	Holly Stores, Inc.	77-3-00490, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel and various other types of articles exported from various countries
R80/285	Re, C.J. September 30, 1980	Leroy Knitted Sportswear	74-2-00332, etc.	Export value	Invoiced unit prices less nondutiable charges (if any) included therein	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Los Angeles Wearing apparel
R80/286	Re, C.J. September 30, 1980	Regal Accessories, Inc.	73-11-03190	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel and various other types of articles exported from various countries
R80/287	Re, C.J. September 30, 1980	Regal Accessories, Inc.	74-5-01402	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel and various other types of articles exported from various countries
R80/288	Re, C.J. September 30, 1980	Regal Accessories, Inc.	76-6-01457	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel and various other types of articles exported from various countries

R80/289	Re, C.J. September 30, 1980	Regal Accessories, Inc.	78-3-00508	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel and other types of articles exported from various countries
R80/290	Ford, J. September 30, 1980	Conti Rubber Products, Inc.	75-3-00717, etc.	Foreign value	Claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Portland Oreg. Various automotive tires
R80/291	Ford, J. September 30, 1980	Conti Rubber Products, Inc.	77-10-04553	Foreign value	Claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Cleveland Various automotive tires
R80/292	Ford, J. September 30, 1980	Conti Rubber Products, Inc.	78-2-00265	Foreign value	Claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Portland, Oreg. Various automotive tires
R80/293	Ford, J. September 30, 1980	Conti Rubber Products, Inc.	78-7-01266	Foreign value	Claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Chicago Various automotive tires
R80/294	Ford, J. September 30, 1980	Conti Rubber Products, Inc.	78-8-01534	Foreign value	Claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Baltimore Various automotive tires

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/295	Ford, J. September 30, 1980	A.W. Fenton & Co., Inc., et al.	R65/25002, etc.	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/296	Ford, J. October 2, 1980	New York Merchandise Co., Inc.	R66/17206, etc.	Export value	F.o.b. unit invoice prices plus 23% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	San Diego Batteries
R80/297	Re, C.J. October 15, 1980	Adorence Co., Inc.	73-6-01540, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise encompassed by entries shown on schedule attached to decision and judgment
R80/298	Re, C.J. October 15, 1980	Adorence Co., Inc.	76-8-01947, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise encompassed by entries shown on schedule attached to decision and judgment
R80/299	Re, C.J. October 15, 1980	Amerex Trading Corp.	74-3-00700	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Baltimore Merchandise encompassed by entries shown on schedule attached to decision and judgment

R80/300	Re, C.J. October 15, 1980	CBS Imports Corp.	77-3-00616	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Merchandise encompassed by entries shown on schedule attached to decision and judgment
R80/301	Richardson, J. October 15, 1980	Eden Toys Inc.	77-12-04836	Constructed value	Articles exported from Haiti or Colombia—f.o.b. invoice unit values plus costs of materials and/or tooling assists furnished by importer as reflected in entry papers, without addition of 25% of costs of assists Articles exported from Hong Kong—f.o.b. invoice unit values plus costs of materials and/or tooling assists furnished by importer as reflected on entry papers, without addition of 15% of costs of assists	Agreed statement of facts.	New York Dolls, toys and various other articles, exported from Haiti, Colombia and Hong Kong
R80/302	Richardson, J. October 15, 1980	Mitsubishi International Corp.	80-7-01205	American selling price	$2.10 per pair for men's, $2.05 per pair for boy's, and $2 per pair for youth's footwear	Agreed statement of facts	Seattle Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/303	Richardson, J. October 27, 1980	Allen-Bradley Company	77-1-00004	Constructed value	Represented by appraised unit values which appear in schedule B attached to decision and judgment, less profit on assists which was provided free of charge to the assembler; these values contain amounts subject to allowances under items 807.00 and 800.00 as specified on said schedule B	Agreed statement of facts	El Paso Electric components
R80/304	Richardson, J. October 27, 1980	Conti Rubber Products Inc.	75-1-00310, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Detroit Various automotive tires

R80/305	Boe, J. October 27, 1980	Conti Rubber Products Inc.	74-10-02691, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statemen of facts		Boston Various automotive tires
R80/306	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	75-1-00307	Foreign value	Appropriate claimed unit values (all in Deutshe mark) listed o i schedule attached to decision and judgment	Agreed statement of facts		New Orleans Various autom tive tires
R80/307	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	75-5-01295	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decis'on and judgment	Agreed statement f facts		Cleveland Various automotive tires
R80/308	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	75-5-01298, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts		Savannah Various automotive tires

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R80/309	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	75-9-02475	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Boston Various automo ive tires
R80/310	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	76-5-01240, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	San Francisco Various automotive tires
R80/311	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	76-5-01292, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of acts	Philade'phia Various automotive tires
R80/312	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	76-5-01338	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	San Juan Various automotive tires
R80/313	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	76-7-01599	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attac'ed to decision and judgment	Agreed statement of facts	Los Angeles Various automotive tires

R80/314	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	77-1-00020	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Boston Various automotive tires
R80/315	Richardson, J. October 28, 1980	Conti Rubber Products Inc.	77-7-01156	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Detroit Various automotive tires
R80/316	Richardson, J. October 28, 1980	A. W. Fenton & Co., Inc., et al.	R65/4153	Export value	Invoice unit prices less, where applicable, items specified on invoices as saved packing	Agreed statement of facts	Cleveland Instruments and parts
R80/317	Richardson, J. October 28, 1980	Inter-Maritime Fwdg. Co. Inc.	236816-A, etc.	Cost of production	As indicated on schedule B attached to decision and judgment	Charles Stockheimer, Inter-Maritime Forwarding Co., Inc. v. U.S. (C.A.D. 642)	New York Cashmere sweaters
R80/318	Richardson, J. October 28, 1980	Inter-Maritime Fwdg. Co. Inc.	250835-A, etc.	Cost of production	As indicated on schedule B attached to decision and judgment	Charles Stockheimer, Inter-Maritime Forwarding Co., Inc. v. U.S. (C.A.D. 642)	New York Cashmere sweaters
R80/319	Richardson, J. October 28, 1980	Inter-Maritime Fwdg. Co., Inc.	276025-A, etc.	Cost of production	As indicated on schedule B attached to decision and judgment	Charles Stockheimer, Inter-Maritime Forwarding Co., Inc. v. U.S. (C.A.D. 642)	New York Cashmere sweaters

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R80/320	Re, C.J. October 30, 1980	Brown Boveri Corp.	76-1-00024, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/321	Re, C.J. October 30, 1980	Brown Boveri Corp.	77-3-00374, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Portland, Oreg. Various articles
R80/322	Re, C.J. October 30, 1980	Brown Boveri Corp.	77-11-04715, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New Orleans Various articles
R80/323	Re, C.J. October 30, 1980	Starlight Trading, Inc.	75-7-01738	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles
R80/324	Re, C.J. October 30, 1980	Starlight Trading, Inc.	75-10-02667	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Various articles

R80/325	Ford, J. October 30, 1980	A. W. Fenton & Co., Inc., et al.	R65/4152, etc.	Export value	Invoice unit price less, where applicable, items specified on invoices as saved packing	Agreed statement of f cts	Cleveland Instruments and parts
R80/326	Richardson, J. October 30, 1980	Antonia Realty & Warehousing Corp.	75–1–00303	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	San Francis o Various automotive tires
R80/327	Richardson, J. October 30, 1980	Bus and Truck Supply Co.	76–1–00090	Export value	$51,800 per bus, plus or minus any increases or reductions in above price, due to addition or elimination of various parts, less 10%, less value of components of U.S. origin allowed on liquidation, plus value of any Michelin tires included in shipments	Agreed statement of facts	New Orleans Inter-city passenger buses
R80/328	Richardson, J. October 30, 1980	Bus and Truck Supply Co. Darrell J. Sekin & Co.	78–9–01558	Export value	$54,'75 per bus, plus or minus any increases or reductions in above price, due to addition or elimination of various parts, less 10%, less value of components of U.S. origin allowed on liquidation, plus value of any Michelin tires included in shipments	Agreed statement of facts	Houston Inter-city passenger buses

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R80/329	Richardson, J. October 30, 1980	Conti Rubber Products Inc.	75-1-00304	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	San Francisco Various automotive tires
R80/330	Richardson, J. October 30, 1980	Conti Rubber Products Inc.	77-3-00331, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Chicago Various automotive tires
R80/331	Richardson, J. October 30, 1980	Conti Rubber Products Inc.	77-3-00333, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	San Francisco Various automotive tires
R80/332	Richardson, J. October 30, 1980	Merit International Corp.	76-9-02212	Constructed value	Invoice unit value, plus amounts for ocean freight from Japan to Canada, and freight chargers to the U.S., packed, as set forth in invoices, or in those instances where ocean freight and shipping charges are not set forth, at invoice units of value plus 10%, packed	Agreed statement of facts	Los Angeles Tape players, headphones, radio converters, speakers, etc.

R80/333	Richardson, J. October 30, 1980	Sercel Incorporated	80-4-00650	Export value	Invoice unit values plus 50% of difference between invoice unit values and appraised values	Agreed statement of facts	Houston Seismographs and parts thereof
R80/334	Richardson, J. October 30, 1980	Trans-Ocean Import Co. Inc.	247024-A, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Cotton and wool hooked rugs
R80/335	Richardson, J. October 30, 1980	Trans-Ocean Import Co. Inc.	R64/19692	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit invoice prices and appraised values	Agreed statement of facts	Baltimore Oval tube rugs
R80/336	Boe, J. October 30, 1980	Conti Rubber Products Inc.	74-7-01790, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Seattle Various automotive tires
R80/337	Boe, J. October 30, 1980	Conti Rubber Products Inc.	74-9-02435, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Philadelphia Various automotive tires
R80/338	Boe, J. October 30, 1980	Conti Rubber Products Inc.	74-9-02437, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	San Juan Various automotive tires

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R80/339	Boe, J. October 30, 1980	Conti Rubber Products Inc.	74-10-02864	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Chicago Various automotive tires
R80/340	Boe, J. October 30, 1980	Conti Rubber Products Inc.	74-10-02865, etc.	Foreign value	Appropriate claimed unit values (all in Deutsche mark) listed on schedule attached to decision and judgment	Agreed statement of facts	Chicago Various automotive tires

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